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In the Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

ALLSTATE INSURANCE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over this appeal under 28 U.S.C. 1252 even though the Equal Employment Opportunity Commission does not seek review of the district court's holding that the one-House legislative veto provision of the Reorganization Act of 1977 (5 U.S.C. 906) is unconstitutional, but instead seeks review only of the relief ordered by the district court.

2. Whether the district court correctly held that, because the legislative veto provision in the Reorganization Act is unconstitutional, the Commission cannot exercise the authority transferred to it by Reorganization Plan No. 1 of 1978 to enforce the Equal Pay Act (29 U.S.C. 206(d)).

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-19a) is reported at 570 F. Supp. 1224.

JURISDICTION

The order of the district court granting summary judgment to appellee was entered on August 19, 1983 (App., *infra*, 20a), and the opinion of the district court was rendered on September 9, 1983 (App., *infra*, 1a-19a). The notice of appeal was filed on September 16, 1983 (App., *infra*, 21a). By order dated November 7, 1983, Justice White extended the time within which to docket the appeal to and including December 15, 1983. If this Court has jurisdiction in this case, it would be under 28 U.S.C. 1252. However, we do not believe the Court has jurisdiction under 28 U.S.C. 1252 because the Equal Employment Opportunity Commission does not seek review of the district court's holding that

the legislative veto provision of the Reorganization Act of 1977 is unconstitutional. See pages 6-8, *infra*. This appeal therefore is taken for protective purposes only pending a decision by the Court in *Heckler* v. *Edwards*, No. 82-874 (argued Nov. 30, 1983). The Commission also has filed a notice of appeal to the court of appeals under 28 U.S.C. 1291.

STATUTORY AND REORGANIZATION PLAN PROVISIONS INVOLVED

The relevant provisions of the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29, 5 U.S.C. 901 *et seq.*; the Equal Pay Act of 1963 (Section 6(d) of the Fair Labor Standards Act of 1938), 29 U.S.C. 206(d)); Sections 16(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. (& Supp. V) 216(c) and 217; and Reorganization Plan No. 1 of 1978, 92 Stat. 3781, are set forth in App., *infra*, 22a-30a.

STATEMENT

This action was filed by the Equal Employment Opportunity Commission in the United States District Court for the Southern District of Mississippi on April 14, 1982, pursuant to Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 216(c) and 217. The complaint alleges that appellee Allstate Insurance Company is violating Section 6(d) of the Fair Labor Standards Act, 29 U.S.C. 206(d)—commonly known as the Equal Pay Act—by paying lower wages to female unit supervisors and underwriters than it pays to male unit supervisors and underwriters performing equal work (Comp. ¶ 7).

When the Equal Pay Act was first enacted in 1963 (Pub. L. No. 88-38, 77 Stat. 56), enforcement authority was vested in the Secretary of Labor, who is responsible for administering the Fair Labor Standards Act generally. See 29 U.S.C. (& Supp. V) 206(d)(3), 216(c) and 217. However, responsibility for administration and enforcement of the Equal Pay Act was transferred from

the Secretary of Labor to the Equal Employment Opportunity Commission by Reorganization Plan No. 1 of 1978, 92 Stat. 3781,[1] which also transferred other equal employment opportunity functions to the Commission.[2] The purpose of the Reorganization Plan was "to consolidate[] Federal equal employment opportunity activities" and to provide, "for the first time, the foundation of a unified, coherent Federal structure to combat job discrimination in all its forms." I Pub. Papers 400 (1978). The transfer of Equal Pay Act functions to the Commission was specifically designed to "minimize overlap and centralize enforcement of statutory prohibitions against sex discrimination in employment," since the Commission already was empowered to enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* I Pub. Papers 403 (1978).

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[1] Reorganization Plan No. 1 of 1978 transferred "[a]ll functions related to enforcing or administering Section 6(d) of the Fair Labor Standards Act, as amended, 29 U.S.C. 206(d) * * * to the Equal Employment Opportunity Commission." Reorg. Plan, § 1. "Such functions include, but shall not be limited to, the functions relating to equal pay administration and enforcement now vested in the Secretary of Labor [and] the Administrator of the Wage and Hour Division of the Department of Labor pursuant to Sections * * * 16(b) and (c) * * * and 17 of the Fair Labor Standards Act." *Ibid.*

[2] The Reorganization Plan also transferred to the Commission: (1) functions vested in the Secretary of Labor and the Civil Service Commission under the Age Discrimination in Employment Act of 1967 (Reorg. Plan, § 2); (2) federal equal employment opportunity enforcement and related functions vested in the Civil Service Commission (Reorg. Plan, § 3); (3) enforcement and related functions vested in the Civil Service Commission pursuant to Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, with respect to federal employment of handicapped persons (Reorg. Plan, § 4); and (4) functions of the Equal Employment Opportunity Coordinating Council, 42 U.S.C. 2000(e)-14 (Reorg. Plan, § 5).

The Reorganization Plan was implemented pursuant to the Reorganization Act of 1977, (Pub. L. No. 95-17, 91 Stat. 29, 5 U.S.C. 901 *et seq.*), which conferred on the President authority to reorganize operations of the Executive departments and agencies subject to certain conditions and limitations imposed by Congress. This reorganization authority previously had expired in 1973. 5 U.S.C. (1976 ed.) 905(b). The authority was reactivated in 1977 for a period of three years (91 Stat. 32) and, after a one-year extension, it expired on April 6, 1981. 5 U.S.C. 905(b).

Under 5 U.S.C. 903, the President was required to transmit any reorganization plan to both Houses of Congress. The reorganization plan then would become "effective" at the end of 60 days of continuous session of Congress after transmittal, unless during that time either House passed a resolution stating in substance that it did not favor the plan. 5 U.S.C. 906(a). A plan that was not vetoed by either House and therefore became effective was to be printed "in the Statutes at Large in the same volume as the public laws" (5 U.S.C. 906(d)). The Reorganization Act further provided that if a statute had vested a function in the agency from which it was removed under a reorganization plan, that function "shall be deemed as vested in the agency under which the function is placed by the plan." 5 U.S.C. 907(a).

In accordance with the requirements of the Reorganization Act, Reorganization Plan No. 1 of 1978 was transmitted by the President to Congress on February 23, 1978. I Pub. Papers 400 (1978). The House of Representatives rejected a resolution disapproving the Plan by a vote of 356 to 39. H.R. Res. 1049, 95th Cong., 2d Sess. (1978); 124 Cong. Rec. 11336-11337 (1978). The Senate Committee on Governmental Affairs unanimously recommended against passage of a resolution of disapproval by the Senate (S. Res. 404, 95th Cong., 2d Sess. (1978); S. Rep. 95-750, 95th Cong., 2d Sess. 6, 10 (1978)), although the resolution of disapproval was not

brought to a vote by the full Senate. See 124 Cong. Rec. 12888 (1978). Because the Reorganization Plan was not vetoed by either House of Congress, it became effective on May 6, 1978 and was printed in the Statutes at Large. 92 Stat. 3781-3782. The particular portions of the Plan relating to enforcement of the Equal Pay Act were implemented on July 1, 1979. Exec. Order No. 12,144, 44 Fed. Reg. 37193 (1979).

2. On August 9, 1983, appellee moved for summary judgment in this action, contending that the transfer of authority to the Commission to enforce the Equal Pay Act was invalid because of the presence of the legislative veto provision in the Reorganization Act. The Commission conceded that the legislative veto provision is unconstitutional in light of this Court's decision in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), which struck down the legislative veto provision in Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2). Appellee further contended that the legislative veto provision is not severable from the remainder of the Reorganization Act; that Reorganization Plan No. 1 of 1978 is invalid as a result, even though it was not vetoed by either House of Congress; and that the Commission therefore is without authority to enforce the Equal Pay Act.

The district court agreed with appellee's arguments, and dismissed the complaint (App., *infra*, 1a-19a). The court rejected the Commission's submission that the legislative veto provision is severable from the remainder of the Act, that the decision in *Chadha* should not be applied retroactively to invalidate plans that were not vetoed and therefore went into effect prior to the date of the *Chadha* decision, and that Congress in any event had ratified the transfer of authority to the Commission (*id.* at 6a-19a).

THE COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL UNDER 28 U.S.C. 1252

This direct appeal under 28 U.S.C. 1252 has been docketed for protective purposes only, pending a decision in *Heckler* v. *Edwards*, No. 82-874 (argued Nov. 30, 1983). We have argued in *Edwards* that a direct appeal to this Court does not lie under 28 U.S.C. 1252 when the appellant does not seek review of the holding that an Act of Congress is unconstitutional and instead challenges only the relief granted by the district court. An appeal challenging only the relief instead must be taken to the court of appeals pursuant to 28 U.S.C. 1291, in the same manner as all other appeals that do not raise the question of the constitutionality of an Act of Congress.[3] For the reasons explained below, the jurisdictional position we have urged in *Edwards* applies equally here. The Commission's appeal therefore lies to the court of appeals under 28 U.S.C. 1291. Accordingly, in addition to taking a protective direct appeal to this Court, the Commission, on October 14, 1983, also filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit (No 83-4656).[4]

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[3] We have furnished appellee with copies of our briefs in *Heckler* v. *Edwards*.

[4] On November 23, 1983, appellee filed a motion in the court of appeals to dismiss the Commission's appeal under 28 U.S.C. 1291, contending that the appeal instead must be taken to this Court under Section 1252. The Commission filed an opposition to the motion to dismiss on December 5, 1983, advancing the position we have taken in *Heckler* v. *Edwards* that a direct appeal does not lie when the appellant does not seek review of the district court's holding that an Act of Congress is unconstitutional. The Commission also suggested that the court of appeals in any event not dismiss the appeal while the question of appellate jurisdiction is pending before this Court in *Edwards* and that the

The Commission conceded in district court that the one-House legislative veto provision in the Reorganization Act is unconstitutional in light of the decision in *Chadha*, and it does not seek review on appeal of the district court's holding that the statutory provision is unconstitutional. The Commission seeks review only of the relief ordered by the district court: dismissal of the Commission's enforcement action. That relief was based on the district court's conclusions that the legislative veto provision of the Reorganization Act is not severable from the remainder of the Act, that Congress intended that even completed reorganization plans would be invalidated if the legislative veto provision were held unconstitutional, and that this Court's decision in *Chadha* should be applied retroactively to invalidate reorganization plans that became effective prior to the Court's decision in that case. These issues do not concern the constitutionality of an Act of Congress.

Whether the legislative veto provision is severable from the remainder of the Act and whether Congress intended even completed reorganization plans to be invalidated are questions solely of statutory construction and legislative intent. See, *e.g.*, *New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976). Similarly, the question whether this Court's decision in *Chadha* should be

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court proceed with briefing and consideration of the case on the merits. The court of appeals has not yet ruled on the motion to dismiss.

In *Muller Optical Co.* v. *EEOC*, No 83-2836 H (W.D. Tenn. Nov. 10, 1983), appeal pending, No 83-5889 (6th Cir.), the district court rejected a similar challenge to the Commission's authority to enforce the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, which was transferred from the Secretary of Labor to the Commission by Section 2 of the same Reorganization Plan at issue here. The district court there held that the legislative veto provision is severable and that, in any event, Congress ratified the transfer of authority. On November 17, 1983, the plaintiffs in *Muller Optical* filed a notice of appeal to the court of appeals under 28 U.S.C. 1291; they have not sought to appeal the question of relief to this Court under 28 U.S.C. 1252.

applied retroactively to invalidate a reorganization plan that was completed before the date of that decision presents no question of the constitutionality of the Reorganization Act. Indeed, it presents no constitutional issue at all, because the "'federal constitution has no voice on the subject' of retrospectivity." *United States* v. *Johnson*, 457 U.S. 537, 542 (1982) (quoting *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1935)). See also *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (plurality opinion of Brennan, J.); *id.* at 92 (Rehnquist, J., concurring in the judgment).

Because the jurisdictional issue under 28 U.S.C. 1252 will be controlled by the Court's decision in *Heckler* v. *Edwards*, we suggest that the Court hold the jurisdictional statement in this case pending that decision. If the Court concludes in *Edwards* that a direct appeal does not lie under 28 U.S.C. 1252 when the appeal does not seek review of the lower court's holding of an Act of Congress unconstitutional, it should dismiss the appeal in this case. If the Court concludes in *Edwards* that a direct appeal must be taken in such circumstances, it then should note probable jurisdiction in this case.

THE QUESTION IS SUBSTANTIAL

The district court plainly erred on the merits in holding that the Commission does not have authority to enforce the Equal Pay Act and in granting summary judgment for appellee on that ground. Although we of course agree that the one-House veto provision in the Reorganization Act is unconstitutional under this Court's decision in *INS* v. *Chadha*, it does not follow that the transfer of enforcement authority to the Commission under a reorganization plan that became effective pursuant to that Act more than five years ago must be invalidated.

1. It should be stressed at the outset that the issue presented here is quite different from—and far narrower than—the severability issue involved in *Chadha*. In that case, the House of Representatives actually had exercised the one-House veto authority contained in Section 244(c)(2) of the Immigration and Nationality Act. Section 244(c)(2) provided that if one House of Congress disapproved the Attorney General's suspension of deportation, "the Attorney General shall thereupon deport such alien * * *." The question whether the legislative veto provision was severable from the remainder of Section 244 was relevant in *Chadha* in determining whether Chadha himself could be granted relief pursuant to the remainder of Section 244 notwithstanding the House of Representatives' veto of the suspension of his deportation and the statutory directive that he be deported because of that veto. In addition, the Court's severability holding in *Chadha* had the effect of permitting the Attorney General to continue to grant suspension of deportation and permanent resident status to aliens in the future without having those decisions subject to the one-House veto mechanism Congress included in Section 244(c)(2). *INS* v. *Chadha*, slip op. 10-14; *id.* at 1-4 (Rehnquist, J., dissenting). Nevertheless, the Court held that the veto provision was severable.

This case is wholly different. Because the President's reorganization authority expired on April 6, 1981 (5 U.S.C. 905(b)), this case does not present any question of whether the President will be permitted to exercise reorganization authority in the future without regard to the legislative veto process. Moreover, unlike the suspension of deportation involved in *Chadha*, the Reorganization Plan at issue here was *not* vetoed by either House of Congress. Because the Reorganization Plan was subject to the control of the legislative veto procedure before it was placed in effect and passed muster

under that procedure, there is no occasion here to consider the broader severability issue involved in *Chadha* of whether Congress would have conferred the authority in question on the Executive *without* subjecting it to the control of a possible legislative veto.[5]

The Reorganization Act itself expressly provides that a Plan that has not been vetoed by either House of Congress during the 60-day period "is effective" (5 U.S.C. 906(a)). The question in this case therefore is whether Congress intended when it enacted the Reorganization Act that Executive action that was not vetoed and therefore became effective *pursuant to* the procedures in the Reorganization Act nevertheless must be invalidated if a court were to conclude at a later date that the unexercised legislative veto authority in the Act is unconstitutional. A compelling showing should be required before the Court attributes to Congress such a perverse intent. No such showing has been made here. In fact, the indicia of legislative intent strongly support the validity of the Plan at issue.

2. As an initial matter, the logic of the legislative veto device itself weighs heavily against invalidation of a reorganization plan that was not vetoed. Supporters of the legislative veto device frequently have defended it on the ground that when neither House of Congress exercises the veto authority, Congress's silence may be taken as approval of the Executive action involved. *INS* v. *Chadha*, slip op. 38 n.22; *id.* at 29-30 (White, J., dissenting). This view was reflected in the consideration of the Reorganization Act of 1977. See H.R. Rep. 95-105, 95th Cong., 1st Sess 11 (1977); S. Rep. 95-32,

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[5] As the court held in *Muller Optical Co.* v. *EEOC*, slip op. 10-15, we believe that Congress would have enacted the reorganization authority without the legislative veto check and that the veto provision therefore is severable. If the Court were to grant plenary review in this case, we would present this broader argument as well.

95th Cong., 1st Sess. 27 (1977) (both quoting the opinion of Attorney General Bell); 123 Cong. Rec. 9350 (1977) (remarks of Rep. Levitas).

Moreover, the Reorganization Act of 1977 was carefully drafted to make it especially likely that reorganization plans would not go into effect unless they met with the approval of Congress (App., *infra*, 12a & n.26). The Act required that resolutions of disapproval automatically would be introduced in the Senate and House on the day following transmittal of a reorganization plan to Congress and would be deemed discharged from the relevant Committee in each House if that Committee did not make its recommendation within 45 days. 5 U.S.C. 910 and 911. The Act then provided that a motion to consider the resolution of disapproval would be in order at any time and would be highly privileged and not be subject to a motion to postpone. 5 U.S.C. 912(a). The obvious purpose of these measures was to assure that even a single Member of the House or Senate could call up the resolution and thereby "virtually assure a vote by both the House and Senate on every plan." H.R. 95-105, *supra*, at 17.[6]

In this case, the House of Representatives expressed overwhelming approval of Reorganization Plan No. 1 of 1978 when it rejected the resolution of disapproval by a vote of 356 to 39. 124 Cong. Rec. 11336-11337 (1978). The Senate Committee on Governmental Affairs unanimously recommended that the Senate likewise reject a resolution of disapproval, and the resolution was not voted upon in the Senate only because its consideration was indefinitely postponed by a unanimous consent

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[6] See also H.R. Rep. 95-105, *supra*, at 2-3; *id.* at 36 (additional views of Chairman Brooks); 123 Cong. Rec. 6146 (1977) (remarks of Sen. Percy); *id.* at 6148 (remarks of Sen. Schmitt); *id.* at 9344 (remarks of Rep. Brooks); *id.* at 9345 (remarks of Rep. Horton); *id.* at 9348 (remarks of Rep. Fascell); *ibid.* (remarks of Rep. Levitas); *id.* at 9359, (remarks of Rep. Drinan).

agreement under which even a single Senator could have objected and insisted that the matter be taken up. 124 Cong. Rec. 12888 (1978). It seems most unlikely that Congress would have intended for a court to invalidate a reorganization plan that became effective according to procedures that both were designed in general and operated in the particular case to ensure that the plan met with the approval of Congress before it was implemented.

A number of other provisions of the Reorganization Act further support this conclusion. First, as noted above, 5 U.S.C. 906(a) expressly provides that a reorganization plan that was not vetoed within the 60-day period allowed "is effective." Second, the Reorganization Act itself contains an explicit legislative validation of the exercise of statutory authority by the transferee agency: 5 U.S.C. 907(a) provides that if a statute "has vested the functions in the agency from which it is removed under the reorganization plan, the function, insofar as it is to be exercised after the plan becomes effective, *shall be deemed as vested in the agency under which the function is placed by the plan*" (emphasis added).

Third, 5 U.S.C. 906(d) provides that a "reorganization plan which is effective shall be printed * * * in the Statutes at Large in the same volume as the public laws * * *." This passage accords a special stature to reorganization plans equivalent to that of public laws, which of course remain in effect until amended or repealed by Congress itself. Fourth, it is significant that the Executive action involved here is that of the President, not of a subordinate officer as in *Chadha*—a factor that likewise accords special stature and finality to a completed reorganization plan. Because the President's action "was taken pursuant to specific congressional authorization, it is 'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and

the burden of persuasion would rest heavily upon any who might attack it.'" *Dames & Moore* v. *Regan*, 453 U.S. 654, 674 (1981) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). These provisions of the Reorganization Act confirm that Congress did not intend a completed reorganization plan to be undone if the unexercised legislative veto authorization was later held to be unconstitutional.

3. In addition, since Reorganization Plan No. 1 was implemented, Congress has explicitly ratified the transfer of authority to the Commission. In the applicable appropriations act for fiscal year 1983, Congress appropriated funds "[f]or necessary expenses of the Equal Employment Opportunity Commission as authorized by Title VII of the Civil Rights Act of 1964, 29 U.S.C. 206(d) and 621-634 * * *."[7] Pub. L. No. 97-377, 96 Stat. 1830, 1874. The explicit reference to 29 U.S.C. 206(d)—the Equal Pay Act—makes clear that Congress intended the Commission to exercise the authority transferred to it under the Reorganization Plan. *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116 (1947); *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301-302 (1937). See *Muller Optical Co.* v. *EEOC*, No. 83-2836 (W.D. Tenn. Nov. 10, 1983), slip op. 15-18.

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[7] 29 U.S.C. 621-634, mentioned in the appropriations act, is the Age Discrimination in Employment Act of 1967. Authority to enforce that Act also was transferred to the Commission by Reorganization Plan No. 1 of 1978 (see note 2, *supra*), and the reference to that Act therefore constitutes a further ratification of the Plan. In addition, Section 905 of the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, 92 Stat. 1224, 5 U.S.C. 1101 note) provides that "[a]ny provision in either Reorganization Plan Number 1 or 2 of * * * 1978 inconsistent with any provision in this Act * * * is hereby superseded." This statutory reference constitutes a ratification of the named Reorganization Plans to the extent they were not superseded. *Fleming* v. *Mohawk*, 331 U.S. at 118-119; *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 147-148 (1937).

What is more, Congress appropriated funds to the Commission for fiscal year 1984 in terms identical to those in the 1983 appropriations act that explicitly refer to the Equal Pay Act (Pub. L. No. 98-166, 97 Stat. 1071 (enrolled bill (H.R. 3222, 98th Cong., 1st Sess. at 18, (1983)), signed by the President on Nov. 28, 1983)). This appropriations act was passed after this Court's decision in *Chadha* made clear that the legislative veto provision of the Reorganization Act is unconstitutional. It therefore removes any doubt about whether Congress intends for the Commission to continue to enforce the Equal Pay Act despite the latent legislative veto defect in the Reorganization Act.[8]

[8] The district court did not discuss the decisions of this Court cited in the text that specifically address the question of congressional ratification of a presidential reorganization by the appropriation of funds to the transferee agency to carry out the function in question. That court instead relied principally on *Greene* v. *McElroy*, 360 U.S. 474, 506-507 (1959), in which the Court held that an appropriation of funds to the Defense Department for various aspects of a security clearance program could not be regarded as a ratification of the precise hearing procedures being challenged, which raised substantial constitutional questions. App., *infra*, 17a-18a. This case is wholly different. The appropriation acts are not relied upon here as a ratification of the Commission's procedures in enforcing the Equal Pay Act, but rather as a ratification of the Commission's authority to enforce the Act. The appropriations acts are unambiguous on this point.

This case also is quite different from *TVA* v. *Hill*, 437 U.S. 153, 180-193 (1978), also relied upon by the district court (App., *infra*, 18a). There, the Court held that a lump sum appropriation to the TVA did not constitute a repeal of the substantive restrictions of the Endangered Species Act as applied to Tellico Dam. Here, unlike in *TVA* v. *Hill*, the appropriations act itself contains the operative language that establishes Congress's intent. Moreover, here the argument is that the statutory language simply *ratifies* the continued exercise of enforcement au-

4. In any event, this Court's decision in *Chadha* should not be applied retroactively to invalidate reorganization plans that were not vetoed by either House of Congress and were implemented before the date of the decision in that case. This Court has identified three considerations that bear upon the issue of retroactivity of its decisions:

> [first] whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases * * *; second "whether retrospective operation will further or retard [the] operation" of the holding in question * * *; and third whether retroactive application "could produce substantial inequitable results" in individual cases * * *.

Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. at 88 (plurality opinion of Brennan, J.) (quoting *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971)). All three of these factors weigh against retroactive application of the *Chadha* holding in this case.

First, the Court in *Chadha* decided an issue of first impression, and its conclusion was not "clearly foreshadowed" by prior decisions of the Court. Second, retroactive application of the *Chadha* holding in the circumstances of this case is not necessary to further the operation of that holding. The potential constitutional defect in the statutory procedure remained dormant in this case, because the one-House veto permitted by 5 U.S.C. 906 was never exercised. Thus, retroactive application is not necessary here to invalidate action actually taken by one House of Congress in violation of the constitutional requirements of bicameralism and presentment to the President, as in *Chadha* itself.

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thority under a reorganization already in place. In *TVA* v. *Hill*, the claim was one of implied *repeal* of substantive law.

Third, retroactive application of the decision in *Chadha* here would produce manifestly inequitable results by disrupting established enforcement procedures in a substantial number of pending cases and in the administration of the Equal Pay Act generally. We have been informed by the Commission that there now are pending 62 Equal Pay Act cases and 105 Age Discrimination in Employment Act (ADEA) cases brought by the Commission. If the Commission's suits are dismissed, substantial confusion may arise with respect to whether actions may be brought by the individual discriminatees under 29 U.S.C. (& Supp. V) 216(b) and (c) and whether the Secretary of Labor may reassume enforcement authority and be substituted as a plaintiff in these cases. In contrast, the defendants in these suits, such as appellee Allstate, have no substantial equitable claim to retroactive application of the *Chadha* holding: the Reorganization Act and Plan did not alter their substantive obligations under the Equal Pay Act or ADEA, and there is no reason to believe that their liability has been affected in any way by the fact that it is the Commission rather than the Secretary of Labor who has brought the suits. A consideration of the equities and the public interest in administrative stability strongly support the conclusion that the Court should not undo the understanding by all concerned over the last five years that the Commission is the proper agency to enforce the Equal Pay Act—an understanding that was confirmed by Congress in appropriating funds to the Commission for the current fiscal year after *Chadha* was decided.[9]

[9] There are nine other reorganization plans that were implemented pursuant to the 1977 Act whose validity also might be called into question by a retroactive application of *Chadha* in circumstances such as those presented here.

CONCLUSION

The jurisdictional statement in this case should be held pending a decision in *Heckler* v. *Edwards*, No. 82-874. If the Court concludes in *Edwards* that an appeal does not lie under 28 U.S.C. 1252 when the appellant does not seek review of the district court's holding that an Act of Congress is unconstitutional, the Court should dismiss the appeal in this case for lack of jurisdiction. On the other hand, if the Court affirms the judgment of the court of appeals in *Edwards*, it should note probable jurisdiction in this case. In that event, the Court may wish to consider summary reversal of the judgment of the district court.

Respectfully submitted.

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DECEMBER 1983

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J82-0186(B)
Filed: Sep 9, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ALLSTATE INSURANCE COMPANY

MEMORANDUM OPINION

On Friday, August 18, 1983, this Court issued a Summary Order granting summary judgment for the Defendant, Allstate Insurance Company. This Memorandum Opinion is written pursuant to that order and incorporates the same.

On April 14, 1982, the Equal Employment Opportunity Commission (hereafter EEOC) sued to enforce the Equal Pay Act. The EEOC alleged that it had authority to enforce the Equal Pay Act[1] pursuant to Section 1 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, which amended 29 U.S.C.A. §§216(c) and 217. Reorganization Plan No. 1 of 1978 was "enacted" pursuant to the Reorganization Act of 1977, 5 U.S.C.A. Section 901, *et seq.*

The present motion for summary judgment made by Allstate places before this Court the legal question of whether or not the EEOC has the authority to enforce the Equal Pay Act by the initiation of litigation.[2] There

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[1] 29 U.S.C.A. § 206

[2] The EEOC's authority to sue is alleged to exist by virtue of 29 U.S.C.A. §§ 216 and 217 whereby the Secretary of Labor may bring an action to enforce 29 U.S.C.A. § 206.

are no genuine issues of material fact with regard to the matters presented by this motion; therefore, it is appropriate to decide the issue of law by summary judgment.

ONE-HOUSE VETO

The basis of Allstate's motion for summary judgment relates to the one-house veto provision contained in the Reorganization Act of 1977. Under this Act the President was granted the authority to present reorganization plans to Congress which either House of Congress could veto by a resolution passed by a majority vote. Reorganization Plan No. 1 of 1978 was not objected to by either House and therefore was "enacted" into law. Section 1 of this Plan transferred the enforcement of the Equal Pay Act from the Labor Department to the EEOC. See 1978 *U.S. Code Cong. & Ad. News* 9799 (reprint of Reorganization Plan No. 1 of 1978).

In a recent United States Supreme Court decision the question of the constitutional validity of one-house veto provisions was decisively resolved. The motion before this Court for summary judgment is based on this decision and the determination of its effect under the facts presented here.

CHADHA

On June 23, 1983, the United States Supreme Court announced its decision in *Immigration and Naturalization Service* v. *Chadha*, ___ U.S. ___, 51 U.S.L.W. 4907 (June 23, 1983). *Chadha* held that the retention by Congress of the power to veto the act of the Attorney General suspending deportation proceedings violated the constitutional doctrines of separation of powers and the constitutional requirement that legislation be accomplished by action by both houses of Congress and by presentment to the President of the United States. *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4914-16. The Supreme Court's exhaustive analysis of the history

behind Article I and its limit on the exercise of legislative power are unnecessary to repeat.[3] Congress may *legislate* and grant certain power, but it may not *revoke* that power granted without *legislating* again.[4] In *Chadha* the Supreme Court found that the one-house veto provision not only violated the bicameralism and presentment requirements of the Constitution, but also infringed upon the doctrine of separation of powers.[5]

STANDING

The EEOC asserts a standing argument which, if sustained, would preclude summary judgment.

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[3] The Supreme Court took great care to emphasize the difficulty of their decision in light of the efficiency and proliferation of the one-house veto as a tool of government. It is clear that their decision goes to the bedrock of our Constitution and examines the reasons for their limitations on the exercise of legislative power.

[4] There are exceptions to the requirement that bills must be passed by both Houses and presented to the President:

> There are but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto:
>
> (a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 6;
>
> (b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 5;
>
> (c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, §2, cl. 2;
>
> (d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.
>
> Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms.

Chadha, 51 U.S.L.W. at 4917. Other limited exceptions were noted, *Id.* at n.20.

[5] *Id.* at 4918.

The EEOC alleges that Allstate does not have standing to challenge the constitutionality of the Reorganization Act of 1977 by claiming that Allstate was not injured by that Act, even if it is unconstitutional.

It is beyond dispute that every defendant has standing to question the legal authority of the plaintiff to sue. The EEOC has attempted to turn Allstate's defense into an offensive weapon by questioning Allstate's standing to assert the alleged constitutional infirmity as a defense. Clearly Allstate has standing to challenge the plaintiff's legal right to sue, but assuming arguendo, that standing is not self-evident in this case this Court will address the merits of the EEOC's standing argument.

The EEOC claims that Allstate has no injury such as may satisfy the standing requirements of Article III of the Constitution. The Article III requirement of standing was recently summarized by the Supreme Court in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) as follows:

> At an irreducible minimum, Art. III requires the party who invokes the Court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision". *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). In this manner does Art. III limit the federal judicial power "to those disputes which confine Federal Courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." (citations omitted).

Allstate has shown that it has personally suffered actual injury in that it has been subjected to a law suit filed pursuant to an unconstitutional statute. There is no doubt that a favorable decision by this Court would redress the injury of which Allstate complains. The identification of this injury to the allegedly unconstitutional passage of the Reorganization Plan No. 1 of 1978 is obvious insofar as the EEOC would have no legal authority to engage in litigation for the purpose of enforcing the provisions of the Equal Pay Act without a constitutional delegation of power from Congress. Therefore, the injury of Allstate in that it is subject to litigation[6] at the instance of a governmental agency whose authority to institute such litigation is being questioned on constitutional grounds meets the Art. III requirements of injury in fact which is traceable to the alleged illegality and which will be redressed by a favorable decision.[7]

UNCONSTITUTIONALITY OF THE ONE-HOUSE VETO

Any use of a legislative veto scheme which has the effect of enacting laws without complying with the Constitutional prescription for legislation is unconstitutional.[8]

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[6] Allstate has submitted an uncontroverted affidavit outlining the scope and effect which this suit has had on its operation as a business as well as the expense it has incurred in its defense.

[7] The EEOC has asserted that Allstate would have been subject to suit by the Labor Department if the responsibility for enforcing the Equal Pay Act had not been transferred to the EEOC. This is speculation on the part of the EEOC and there is no evidence which has been submitted to this Court to substantiate such allegations. This Court may not engage in speculation as to what the Department of Labor would do if it were charged with enforcing the Equal Pay Act.

[8] The Constitution sets forth the "prescription for Legislative action: passage by a majority of both Houses and presentment to the President." *Chadha*, ___ U.S. ___, 51 U.S.L.W. at 4918.

The EEOC urges that since both Houses of Congress rejected a veto of the Reorganization Plan, the "enactment" was constitutional. A resolution to disapprove the Plan was introduced in

I.

The first issue to decide is whether the action complained of here was "essentially legislative in purpose and effect." *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4916. The reorganization accomplished under the Plan altered the legal status of agencies and of individuals, including Allstate, by transferring enforcement functions of the Equal Pay Act from the Department of Labor to the EEOC. Such reorganization of the Executive Branch is a legislative function.[9] The reorganization became published law just as though it had been introduced into Congress as a regular bill and thereafter passed by both Houses and not vetoed by the President.

This Court must conclude that the reorganization was essentially legislative in its purpose and effect.

II.

This conclusion takes us to the second issue: Does the fact that no veto was interposed alter the requirements of bicameralism and presentment?

The question presented by this case is not directly answered in *Chadha*. *Chadha* did emphasize the importance of preserving the separation of powers between the executive and legislative branches of government.[10]

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the House and defeated, but the Senate never acted on a similar resolution. *See* 124 Cong. Rec. 1136-37 (1978) (house vote to disapprove resolution objecting to plan); S. Rep. No. 750, 95th Cong., 2nd Sess. 1 (1978) (committee report approving plan; no vote on the floor was taken).

[9] Representative Brooks noted that "[d]etermination of the organizational structure of the executive branch is a legislative function. Make no mistake about that." 124 *Cong. Rec.* 9344 (1977).

[10] "The bicameral requirement, the Presentment Clause, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident ex-

Moreover, the Court noted that "[t]o allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I." *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4918 n.22. It is evident from the opinion in *Chadha* that "every use of the legislative veto" is invalid.[11]

The fundamental problem with the legislative retention of veto power is that it places the executive in the position of legislating subject to a Congressional veto.[12] In this sense it stands Art. I of the Constitution on its head. Congress has various tools by which it may control its grant of power, but "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." *Id.* at 4917. Because the Court in *Chadha* clearly sweeps with a broad stroke in its holding that the legislative one-house veto is unconstitutional, this Court must follow that precedent[13] by holding that a retained one-house veto is unconstitutional even when not exercised.

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ercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded."

Chadha, ___ U.S. at ___, 51 U.S.L.W. at 4918.

[11] *Id.* (Powell, J. concurring). Justice Powell perceives that the *Chadha* decision is based on broad constitutional doctrines such that every use of the one-house veto is impermissible.

[12] It has been noted that the presence of a one-house veto makes it necessary to defer to individuals in Congress in formulating proposals because of the increased power of a small minority to achieve a legislative result. *Clark* v. *Valeo*, 559 F.2d 642, 681 (D.C. Cir. 1977) (en banc) (MacKinnon, J. dissenting).

[13] *See* Consumer Energy Council of America *v.* FERC, 673 F.2d 425 (D.C. Cir. 1982), aff'd, ___ U.S. ___, 51 U.S.L.W. 3935 (1983). The Supreme Court affirmed the court of appeals without opinion upholding the decision in *Chadha*.

III.

The EEOC has argued that the constitutional issue is not ripe for decision because no veto power was exercised by Congress. The EEOC cites *Clark* v. *Valeo*,[14] 559 F.2d 642 (D.C. Cir. 1977)(*en banc*), a case in which no veto was exercised. The Court in *Clark* v. *Valeo* states that "[a] contention that there are no real considerations of ripeness here can rest on a view of the merits that a one-house veto is so patently unconstitutional that nothing more is needed to inform the judgment of this Court." *Id.* at 649.

The Court in *Clark* v. *Valeo* relied on Justice White's concurring opinion in *Buckley* v. *Valeo*, 424 U.S.1, 257-86 (1976) (White, J., concurring) where he concluded that the one-house veto provision was constitutional. The Court in its *per curiam* opinion in *Buckley* v. *Valeo*, did not reach the issue of the constitutionality of the unexercised one-house veto.[15] Justice White *alone* reached the one-house veto finding it constitutional.

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[14] *Clark* v. *Valeo* dismissed the constitutional attack on the one-house veto as unripe. The *Clark* Court held that there were two parts to the statutory scheme in question: first, the statute provided for a laying-over period which was found unconstitutional under *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941); secondly there was a provision that the veto under the laying-over provision might be accomplished by the unicameral or one-house veto. *Clark*, 559 F.2d at 649. The Court determined that the second part of review provision had not come into play because Congress adjourned *sine die* two days prior to the running of the laying-over period during which the veto might have been interposed.

On this basis the constitutional attack on the one-house veto was dismissed as unripe. *Id.* at 650.

[15] The Supreme Court cites *Buckley* v. *Valeo* in its *Chadha* decision but does so for general principles of constitutional adjudication and separation of powers, not in the context of addressing the validity *vel non* of the one-house veto.

Chadha has intervened at this juncture, and under the theory of the *Clark* v. *Valeo* court that an adjudication of the constitutionality of an unexercised one-house veto would be ripe only if it were patently unconstitutional, this Court today holds that *Chadha* must be read to say that "[t]o allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art. I."[16] To rely on Justice White's concurring opinion in *Buckley* v. *Valeo* at this point would be suspect because Justice White was one of the two dissenters writing to uphold the one-house veto provision in *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4920.

This Court is bound by the Supreme Court's decision in *Chadha* and must follow its instruction. The reasons noted in *Clark* v. *Valeo* for not addressing the constitutional issue presented by the one-house veto, whether it is exercised or not, have evaporated.[17]

SEVERABILITY

The United States Supreme Court has recently restated the general rule that the invalid parts of a statute are to be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refing Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). There is no severability clause present in the Reorganization Act of 1977.[18] This Court

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[16] *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4918 n.22.

[17] *See Clark* v. *Valeo*, 559 F.2d at 650 n.10 (reasons for not reaching the constitutional issue).

[18] The absence of a severability clause suggests the inseverability of the provision, *see Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312-13 (1936) (in absence of a severability clause, the presumption is against mutilation of the statute and that the statute was intended to be effective in its entirety).

must then "embark on that elusive inquiry", *Chadha*, ___ U.S. at ___, 51 U.S.L.W. at 4911, to determine "whether Congress would have enacted other portions of the statute in the absence of the invalidated provision." *American Federation of Government Employees* v. *Pierce*, 697 F.2d 303, 307 (D.C. Cir. 1982) quoting *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982). If the veto provision in Section 906(a) is severable from the rest of the Reorganization Act, then the President's proposal contained in Reorganization Plan No. 1 of 1978 would presumably be an exercise of executive authority delegated under legislative grant. The essential question which must be answered to determine this is whether or not Congress would have delegated such broad authority to the President without reserving for itself the review power which is contained in the one-house veto provision that has been found unconstitutional by this Court under the Supreme Court's decision in *Chadha*.

The Reorganization Act of 1977 re-established for a three year period the authority of the President to submit plans for the reorganization of the executive branch of the government.[19] Congress was aware that the one-house veto which was contained in the statute passed as the Reorganization Act of 1977 was of questionable constitutionality.[20] Although the Attorney General had is-

[19] H.R. Rep. No. 95-105, 95th Cong., 1st. Sess. 2, reprinted in 1977 *U.S. Code Cong. & Ad. News* 41.

[20] The constitutional issues were discussed at length in the legislative history of this Act. This discussion includes the opinions of constitutional scholars and others. *See* 123 *Cong. Rec.* 9349 (1977) (statement of Rep. Levitas) (arguments against the bill are that it is unconstitutional because it violates the "presentation clause" of the Constitution and that it violates the separation of powers between the executive and legislative branches of government. The representative expressed the view that Justice White's concurring opinion in *Buckley* v. *Valeo* supports the constitutionality of the veto provision and

sued an opinion stating his belief that the veto provision is constitutional,[21] Congress had the benefit of credible advice to the contrary.

In light of these possible constitutional problems an amendment was proposed which purported to restrict the relief which a court might grant to the holding of a single plan unconstitutional instead of all plans which had been passed under that statute.[22] The discussion on this amendment did not even approach the question of whether the one-house veto should be severed from the Act but was focused on whether a court could or would be limited to invalidating one plan instead of all the plans which had been passed by virtue of the one-house veto provision.[23] Evidence that the one-house veto provision was essential to the Congress in enacting the Reorganization Act of 1977 is found in the steps taken by Congress to amend the previous reorganization act to

sets forth other reasons why the veto provision should be upheld and included in the legislation.); H.R. Rep. No. 95-105, 95th Cong. 1st. Sess. 9-17, reprinted in 1977 *U.S. Code & Ad. Cong. News* 49-57 (discussion in legislative history of the constitutional issues involved in the one-house veto provision contained in the Act).

[21] H.R. Rep. No. 95-105, 95th Cong., 1st Sess. 10, reprinted in 1977 *U.S. Code Cong. & Ad. News*, 50. The opinion states in part:

> [I]f the procedures provided in a given statute have no effect on the constitutional distribution of power between the legislative and the executive—that is, the power of Presidential veto is effectively preserved and the principal of bicameralism is respected—*the fact that the procedure is not explicitly authorized by the language of Art. I is not enough to render the statute unconstitutional.* I am of the opinion that the procedure provided in the reorganization statute for congressional disapproval of a reorganization plan submitted by the President satisfies this test and, therefore, is constitutional. (emphasis added).

[22] 123 *Cong. Rec.* 9363-9365 (1977).

[23] *Id* at 9364.

assure that a vote could be taken on each and every plan proposed by the President.[24]

Representative Brooks, one of the sponsors of the Reorganization Act of 1977, stated during floor debate that while "[d]etermination of the organizational structure of the executive branch is a legislative function," the principal issue "to consider here today [is] how much authority the President should have, and what role Congress should play in the reorganization process."[25] Representative Brooks expressed concern over the constitutionality of the veto provision, even to the extent of introducing another bill which did not contain that provision. Representative Brooks explained his position as follows:

> I introduced a reorganization bill that would have met both the objectives of the President and the requirements of the Constitution. Unfortunately, the bill before us today takes a slightly different approach. I have chosen to support it, however, because I believe the new voting procedure—which was taken from my bill—and the limitations on the use of reorganization authority to which the committee agreed, will provide Congress with far more control over reorganization than would have been the case if the President's proposals had gone through unchallenged.[26]

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[24] "A major objective of the sponsors of this legislation was to develop a procedure under which an opportunity for a vote by Congress will be assured on each plan." H.R. Rep. No. 95-105, 95th Cong. 1st. Sess. 8, reprinted in 1977 *U.S. Code Cong. & Ad.News*, 48.

[25] 123 *Cong. Rec.* 9344.

[26] *Id.* The voting procedure to which Rep. Brooks referred is the procedure codified at 5 U.S.C.A. §§908 through 912. The procedure is designed to assure that each house will vote on every plan submitted. Essentially, it involved the automatic introduction of a resolution disfavoring the plan and also that such should be sent to the appropriate committee for consideration

Although not dispositive of the intent of Congress, the statements of one of the legislation's sponsors "deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). Representative Brooks expression that Congress wishes to retain control over the President's activities is almost a foregone conclusion. This is obviously the reason Congress inserted the one-house veto provision in the Act and certainly it would not be suggested that the intent of Congress was to allow the one-house veto provision to be severed giving the President free reign to propose and enact whatever reorganization he desired within the framework of the delegation of power contained in the other sections of the Act.[27] Interestingly enough, the amendment which was proposed including a severability provision was introduced for the purpose of limiting the scope of judicial review to any one plan which might come before a court; this amendment was not introduced to in any way sever the one house veto provision from the remaining parts of the Act.[28]

In summary, there is no doubt that Congress intended the one-house veto provision to be an integral and inseparable part of the entire Act such that it would limit the power of the President to propose and enact reorganization plans. Congress expressed without equivocation its desire to restrict the President's power

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and if not reported out of committee after forty-five days it would be placed on the appropriate calendar of the House involved. This procedure is designed to guarantee a vote within the sixty day period which Congress has to consider a reorganization plan. *See* H.R. Rep. No. 95-105, 95th Cong. 1st. Sess. 8-9, reprinted in 1977 *U.S. Code Cong. & Ad. News* 48.

[27] See 5 U.S.C.A. §§904 and 905 (setting out parameters within which the President must act in submitting reorganization plans).

[28] *See supra* notes 22 & 23 and accompanying text.

to reorganize the executive branch. Pursuant to this, the entire Act must be held unconstitutional in that the one-house veto provision was enacted as an integral and inseparable part of the grant of power to the President. It is, of course, unfortunate that Congress chose an unconstitutional means by which to review and restrict the exercise of the authority which it granted to the President.

RETROACTIVE APPLICATION

The Supreme Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) addressed the doctrine of nonretroactivity and its appropriate applications. In that case the Court stated:

> [W]e have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases. (citations omitted)
>
> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by over-ruling clear past precedent on which litigants may have relied, ..., or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must ... weigh the merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect and whether retrospective operation will further or retard its operation." (citation omitted) Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity" (citation omitted)

Chevron Oil Co. v. *Huson*, 404 U.S. at 106-07.

To determine whether a decision should be given only prospective application often involves a determination of the interpretation to be placed on statutes under a given set of circumstances.[29] This Court is bound by the recent Supreme Court decision in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, ___ U.S. ___, 102 S.Ct. 2858, 2880 (1982). In *Marathon* the Supreme Court invalidated the broad grant of jurisdiction given the bankruptcy courts by statute.[30] In deciding whether the invalidation of this jurisdiction should be applied retroactively, the Court stated "[i]t is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an *unprecedented question* of *interpretation* of Art. III." (emphasis added).[31] The Court also noted the substantial injustice and hardship which would be visited upon those who had relied on the statutory grant of power to the bankruptcy courts.

Marathon represented an extreme case where the Supreme Court not only determined that the application of its holding should apply prospectively and not retroactively, but also that it should take effect at a later date. Consistent with that holding they stayed their judgment until October 4, 1982, almost four months after the decision.[32]

It is clear that the decision to deny retroactive application in *Marathon* was based on the pervasive and far-reaching effects of that decision. In contrast, by holding that the Reorganization Act of 1977 is unconstitutional thereby undercutting EEOC's authority to sue, which clearly must rest on a statutory grant of power, this

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[29] *E.g. Valencia* v. *Anderson Bros. Ford*, 617 F.2d 1278, 1288-90 (7th Cir. 1980) *rev'd on other grounds* 452 U.S. 205 (1981) (analyzing decisions which bore on the question of the construction of the Truth in Lending Act).

[30] ___ U.S. at ___, 102 S.Ct. at 2880.

[31] *Id.*

[32] *Id.*

Court decides a narrow and isolated issue, one which is required of it by the United States Supreme Court's decision in *Chadha*.

The three considerations set forth in *Chevron Oil Co.* v. *Huson* must be decided against prospective-only application of the decision of this Court.

First, this is not a case of first impression and the decision of this Court was definitely foreshadowed by prior events. Not only has the Supreme Court acted in *Chadha*, but it has been obvious in a review of the legislative history that Congress was well aware that such a decision might ultimately invalidate their use of the one-house veto scheme.[33]

Secondly, retrospective operation of this holding will not retard the application of *Chadha* which was clearly envisioned by the Supreme Court in its decision in that case. In fact, to deny retroactive application would encourage the EEOC to pursue other similar suits in spite of its lack of a constitutionally sound grant of statutory authority to do so. The fundamental issue must be addressed by Congress which may vest in the EEOC the statutory authority to sue by appropriate *legislative* action.

Thirdly, there are no individual cases in which retroactive application of this decision would produce inequitable results. The Equal Pay Act includes a provision for individuals to sue in their own right.[34] In spite of the United States Supreme Court's obvious recognition that their decision in *Chadha* would have far-reaching effect, the Court engaged in no discussion and gave no indication that *Chadha* should not be applied retroact-

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[33] *See supra* notes 20 through 23 and accompanying text. (legislative history clearly indicates the continuing concern of many members of Congress over the constitutionality of the one-house veto provision and the advice of legal scholars that such provision would be held unconstitutional).

[34] 29 U.S.C.A. § 216(b)(supp. 1982).

ively. While their silence on this issue is not dispositive, it is persuasive.

CONGRESSIONAL RATIFICATION

The EEOC argues that Congress has ratified the transfer of the enforcement function under the Equal Pay Act to the EEOC by its appropriation of funds and other statutory references that have been passed in compliance with the constitutional requirements of bicameralism and presentment. In *Greene* v. *McElroy*, 360 U.S. 474 (1959) the Supreme Court held that Congressional ratification of security clearance procedures which were promulgated by the Secretary of Defense without express authorization of either the President or Congress could not be implied from the continued appropriation of funds to finance the program fashioned by the Department of Defense. In its opinion the Supreme Court stated:

> If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. In many circumstnces, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred.... Before we are asked to judge whether, in that context of security clearance cases, a person may be deprived to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. *Cf. Watkins* v. *United States*, 354 U.S. 178; *Skull* v. *Virginia*, 359 U.S. 344. *Such decisions cannot be assumed by acquiescence or non-action. Kent* v. *Dulles*, 357

> U.S. 116; *Peters* v. *Hobby*, 349 U.S. 331; *Ex Parte Endo*, 323 U.S. 283, 301-302. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, *See Peters* v. *Hobby supra*, but also *because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.* Without explicit action by law makers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them. (emphasis added).

Green v. *McElroy*, 360 U.S. at 506-07.

Although there is no doubt that Congress has the authority to enact legislation which would vest the power to enforce the Equal Pay Act in the EEOC, "...[i]t must be recognized that there is more than a passing distinction between substantive legislation and appropriation bills." *Pacific Legal Foundation* v. *Goyan*, 664 F.2d 1221, 1226 (4th Cir. 1981). *See Andrus* v. *Sierra Club*, 442 U.S. 347, 355-65 (1979) (analysis of the "careful distinction Congress has maintained between appropriation and legislation." *Id.* at 364, holding that appropriation requests do not constitute proposals for legislation); *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 189-93 (1978) (argument that subsequent appropriations measures which funded the construction of a facility in violation of the Endangered Species Act did not impliedly exempt that specific project from coverage of the Act; a contrary policy would violate express rules of both Houses of Congress providing that appropriation measures may not change existing substantive law).

From the foregoing it is clear that by appropriating funds for the EEOC, Congress has done nothing to directly enact legislation which would address the sub-

stantive issue of the EEOC's authority to institute litigation for enforcement of the Equal Pay Act.

CONCLUSION

Although this decision will have far-reaching ramifications, it is one that is demanded under the clear terms of the decision of the Supreme Court in *Chadha*.

In light of the foregoing discussion of the technical legal principles, this court must conclude that the Reorganization Act of 1977 is unconstitutional. It necessarily follows that the Reorganizational Plan 1 of 1978, which contains the provision allowing the EEOC to enforce the Equal Pay Act, is unconstititutional since the Plan was adopted pursuant to the Act. Finally, it follows that the EEOC has no authority to act as Plaintiff in this cause and that Defendant's motion for summary judgment must be sustained.

THIS THE 9th day of September, 1983.

/S/ WILLIAM H. BARBOUR

United States District Judge

APPENDIX B

IN THE UNITED STATED DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J82-0186(B)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

ALLSTATE INSURANCE COMPANY, DEFENDANT

ORDER

THIS matter, having come before this Court on Defendant's Motion for Summary Judgment, and the Court having considered the memoranda submitted on behalf of the parties, does find that the Defendant is entitled to a judgment as a matter of law. This Court will issue a memorandum opinion setting forth its findings in regard to the granting of this Motion at its earliest opportunity.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion of the Allstate Insurance Company for Summary Judgment be, and the same is hereby granted.

ORDERED AND ADJUDGED this 19th day of August, 1983.

/S/ WILLIAM H. BARBOUR
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

CIVIL ACTION NO. J82-0186(B)

Filed Sept. 16, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF,

v.

ALLSTATE INSURANCE COMPANY, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Equal Employment Opportunity Commission, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the order granting summary judgment in favor of Allstate Insurance Company entered in this action on August 19, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

/S/ _____

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APPENDIX D
STATUTORY AND REORGANIZATION PLAN PROVISIONS INVOLVED

1. The Reorganizaton Act of 1977, Pub. L. No. 95-17, 91 Stat. 29, as codified at 5 U.S.C. 901 *et seq.*, provides in pertinent part:

§ 901. Purpose

(a) The Congress declares that it is the policy of the United States—

(1) to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;

(2) to reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Government;

(3) to increase the efficiency of the operations of the Government to the fullest extent practicable;

(4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;

(5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and

(6) To eliminate overlapping and duplication of effort.

(b) Congress declares that the public interest demands the carrying out of the purposes of subsection (a) of this section and that the purposes may be accomplished in great measure by proceeding under this chapter, and can be accomplished more speedily thereby than by the enactment of specific legislation.

(c) It is the intent of Congress that the President should provide appropriate means for broad

citizen advice and participation in restructuring and reorganizing the executive branch.

(d) The President shall from time to time examine the organization of all agencies and shall determine what changes in such organization are necessary to carry out any policy set forth in subsection (a) of this section.

* * * * *

§ 903. Reorganization plans

(a) Whenever the President, after investigation, finds that changes in the organization of agencies are necessary to carry out any policy set forth in section 901(a) of this title, he shall prepare a reorganization plan specifying the reorganizations he finds are necessary. Any plan may provide for—

(1) the transfer of the whole or a part of an agency, or of the whole or a part of the functions thereof, to the jurisdiction and control of another agency;

(2) the abolition of all or a part of the functions of an agency, except that no enforcement function or statutory program shall be abolished by the plan;

(3) the consolidation or coordination of the whole or a part of an agency, or of the whole or a part of the functions thereof, with the whole or a part of another agency or the functions thereof;

(4) the consolidation or coordination of part of an agency or the functions thereof with another part of the same agency or the functions thereof;

(5) the authorization of an officer to delegate any of his functions; or

(6) the abolition of the whole or a part of an agency which agency or part does not have, or on the taking effect of the reorganization plan will not have, any functions.

The President shall transmit the plan (bearing an identification number) to the Congress together with a declaration that, with respect to each reor-

ganization included in the plan, he has found that the reorganization is necessary to carry out any policy set forth in section 901(a) of this title.

* * * * *

§ 905. Limitation on powers

(a) A reorganization plan may not provide for, and a reorganization under this chapter may not have the effect of—

(1) creating a new executive department, abolishing or transferring an executive department or independent regulatory agency, or all the functions thereof, or consolidating two or more executive departments or two or more independent regulatory agencies, or all the functions thereof;

(2) continuing an agency beyond the period authorized by law for its existence or beyond the time when it would have terminated if the reorganization had not been made;

(3) continuing a function beyond the period authorized by law for its exercise or beyond the time when it would have terminated if the reorganization had not been made;

(4) authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress;

(5) increasing the term of an office beyond that provided by law for the office; or

(6) dealing with more than one logicaly consistent subject matter.

(b) A provision contained in a reorganization plan may take effect only if the plan is transmitted to Congress within four years of the date of enactment of the Reorganization Act of 1977.

§ 906. Effective date and publication of reorganization plans

(a) Except as otherwise provided under subsection (c) of this section, a reorganizaton plan is effec-

tive at the end of the first period of sixty calendar days of continuous session of Congress after the date on which the plan is transmitted to it unless, between the date of transmittal and the end of the sixty-day period, either House passes a resolution stating in substance that the House does not favor the reorganization plan.

(b) For the purpose of this chapter—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

(c) Under provisions contained in a reorganization plan, any provision thereof may be effective at a time later than the date on which the plan otherwise is effective or, if both Houses of Congress have defeated a resolution of disapproval, may be effective at a time earlier than the expiration of the sixty-day period required by subsection (a).

(d) A reorganization plan which is effective shall be printed (1) in the Statutes at Large in the same volume as the public laws and (2) in the Federal Register.

§ 907. Effect on other laws, pending legal proceedings, and unexpended appropriations

(a) A statute enacted, and a regulation or other action made, prescribed, issued, granted, or performed in respect of or by an agency or function affected by a reorganization under this chapter, before the effective date of the reorganization, has, except to the extent rescinded, modified, superseded, or made inapplicable by or under authority of law or by the abolition of a function, the same effect as if the reorganization had not been made. However, if the statute, regulation, or other action has vested the functions in the agency from which

it is removed under the reorganization plan, the function insofar as it is to be exercised after the plan becomes effective, shall be deemed as vested in the agency under which the function is placed by the plan.

(b) For the purpose of subsection (a) of this section, "regulation or other action" means a regulation, rule, order, policy, determination, directive, authorization, permit, privilege, requirement, designation, or other action.

(c) A suit, action, or other proceeding lawfully commenced by or against the head of an agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, does not abate by reason of the taking effect of a reorganization plan under this chapter. On motion of supplemental petition filed at any time within twelve months after the reorganization plan takes effect, showing a necessity for a survival of the suit, action, or other proceeding to obtain a settlement of the questions involved, the court may allow the suit, action, or other proceeding to be maintained by or against the successor of the head or officer under the reorganization effected by the plan or, if there is no successor, against such agency or officer as the President designates.

(d) The appropriations or portions of appropriations unexpended by reason of the operation of the chapter may not be used for any purpose, but shall revert to the Treasury.

* * * * *

2. The Equal Pay Act of 1963 (Section 6(d) of the Fair Labor Standards Act of 1938), as codified at 29 U.S.C. 206(d), provides:

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of

sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay hours of employment, or conditions of work.

3. Section 16(c) of the Fair Labor Standards Act of 1938, as amended and codified at 29 U.S.C. (Supp. V) 216(c), provides:

§ 216. Penalties

* * * * *

(c) Payment of wages and compensation; waiver of claims; actions by the Secretary; limitation of actions

The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under secton 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sum thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered

into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

4. Section 17 of the Fair Labor Standards Act of 1938, as codified at 29 U.S.C. 217, provides:

§ 217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

5. Section 1 of Reorganization Plan No. 1 of 1978, as printed at 92 Stat. 3781, provides:

REORGANIZATION PLAN NO. 1 OF 1978

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, February 23, 1978, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code.

Equal Employment Opportunity

SECTION 1. *Transfer of Equal Pay Enforcement Functions*

All functions related to enforcing or administering Section 6(d) of the Fair Labor Standards Act, as amended, (29 U.S.C. 206(d)) are hereby transferred to the Equal Employment Opportunity Commission. Such functions include, but shall not be limited to, the functions relating to equal pay administration and enforcement now vested in the Secretary of Labor, the Administrator of the Wage and Hour Division of the Department of Labor, and the Civil Service Commission pursuant to Sections 4(d)(1); 4(f); 9; 11(a), (b), and (c); 16(d) and (c) and 17 of the Fair Labor Labor [*sic*] Standards Act, as amended, (29 U.S.C. 204(d)(1); 204(f); 209, 211(a), (b), and (c); 216(b) and (c) and 217) and Section 10(b)(1) of the Portal-to-Portal Act of 1947, as amended, (29 U.S.C. 259).

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No. 83-1021

In the Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

ALLSTATE INSURANCE COMPANY

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

SUPPLEMENTAL MEMORANDUM FOR THE APPELLANT

REX E. LEE
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ON APPEAL FROM THE
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SUPPLEMENTAL MEMORANDUM FOR THE APPELLANT

Pursuant to Rule 16.6 of the Rules of this Court, the Solicitor General, on behalf of the appellant, respectfully files this supplemental memorandum to inform the Court of the recent decision in *EEOC* v. *Hernando Bank, Inc.*, No. 82-4298 (5th Cir. Feb. 13, 1984), which came to our attention after the Reply Brief was filed.[1] The Fifth Circuit in that case rejected the precise argument appellee raised in

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[1]We have lodged ten copies of the opinion in *Hernando Bank* with the Clerk of this Court.

The appellee in *Hernando Bank* did not raise the issue of the Commission's enforcement authority in district court. The case was pending before the court of appeals on the Commission's appeal on the merits when this Court rendered its decision in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), and the court of appeals addressed the question of the Commission's enforcement authority in light of the decision in *Chadha*. Slip op. 2055.

district court and renews in this Court: that the Commission does not have authority to enforce the Equal Pay Act because of the presence of the unexercised legislative veto provision in the Reorganization Act of 1977.

The court of appeals concluded in *Hernando Bank*, "[a]fter a close analysis of the language and legislative history of the Reorganization Act" (slip op. 2056), that the unconstitutional one-House legislative veto provision is severable from the remainder of the Act because it is not "'evident'" that Congress would have declined to enact the remainder of the Reorganization Act without the legislative veto provision and because the remainder of the Act "'is fully operative as a law.'" Slip op. 2056, quoting *Buckley* v. *Valeo*, 424 U.S. 1, 109 (1976), and *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). The court found in the text and legislative history of the Act a congressional determination that reorganization was necessary to increase governmental efficiency and for other purposes (see 5 U.S.C. 901(a)) and that these objectives could best be achieved by vesting the President with the necessary reorganization authority. The court also observed that Congress had included a number of restrictions in the Act in addition to the legislative veto provision in order to limit the President's reorganization authority, thereby further indicating that Congress would have passed the Reorganization Act even without the specific restriction of the legislative veto. Slip op. 2056-2057.

In addition, the court of appeals "perceive[d] a significant distinction between the exercise of a one-house legislative veto, such as that held invalid in *Chadha*, and the mere presence of an unexercised legislative veto in the Reorganization Act" (slip op. 2057 n.2). We, too, have stressed that this factor weighs heavily against invalidation of Reorganization Plan No. 1 and the Commission's enforcement authority. See J.S. 9-13, 15; Reply Br. 5-6, 7-8. Finally, the

court found it significant that, unlike the Executive action in *Chadha*, Reorganization Plan No. 1 did not affect the substantive rights of any person, but simply transferred existing enforcement authority with respect to those rights "from one executive agency to another" (slip op. 2058 n.2).

The decision in *Hernando Bank* adds the considered judgment of an appellate court to the weight of district court authority discussed in our Reply Brief (at 3-4 & n.2) that sustains the Commission's post-*Chadha* exercise of enforcement authority acquired pursuant to Reorganization Plan No. 1. And because the Fifth Circuit's decision in *Hernando Bank* will control the Commission's alternative appeal to the Fifth Circuit in the instant case (see J.S. 6) and thereby permit a prompt disposition of that appeal, the resolution of appellee's challenge to the Commission's enforcement authority will not be delayed if this Court dismisses the Commission's direct appeal in this case for lack of jurisdiction under 28 U.S.C. 1252, as we have submitted it should do.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1984

DOJ-1984-02

83 - 1021

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant Cross Appellee,

v.

The HERNANDO BANK, INC., Defendant-Appellee Cross Appellant.

No. 82-4298.

United States Court of Appeals, Fifth Circuit.

Feb. 13, 1984.

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Equal Employment Opportunity Commission sued bank under Equal Pay Act and Civil Rights Act claiming sex discrimination in pay of female assistant cashiers. The United States District Court for the Northern District of Mississippi, L.T. Senter, Jr., Chief Judge, rendered summary judgment dismissing the claims, and agency appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) unconstitutional one-house legislative veto provision of Reorganization Act of 1977 is severable; (2) acting under the Act the president properly transferred authority from Secretary of Labor to EEOC to enforce the Equal Pay Act; (3) claims were not barred by limitations, notwithstanding that subject female employees were listed in prayer for relief section and not specifically named as plaintiffs; (4) agency is not required to conciliate as precondition for filing suit; (5) it was error to dismiss on basis of employees' affidavit that they were not aware of sex discrimination and did not authorize the agency to represent them.

Reversed and remanded.

1. Statutes ⇐64(2)
United States ⇐29

One-house veto decision of Reorganization Act of 1977 is unconstitutional, but is severable. 5 U.S.C.A. § 906.

2. Statutes ⇐64(1)

Ultimate determination of severability of an invalid provision of an enactment will rarely turn on presence or absence of a severability clause as relevant test is whether Congress would have enacted remainder of the statute absent the invalid provision.

3. Statutes ⇐64(1)

Mere uncertainty about legislative intent, i.e., whether legislature would have enacted remainder of act absent invalid provision, is not determinative of severability issue.

4. United States ⇐29

Reorganization Act of 1977 validly delegated to the president legislative authority to promulgate executive branch reorganization plans. 5 U.S.C.A. §§ 901-912.

5. United States ⇐29

Since president's Reorganization Plan No. 1 of 1978 conformed to substantive provision of Reorganization Act and did not transgress any limitations imposed by Act, the plan was enforceable and effected a valid transfer of governmental authority to enforce the Equal Pay Act from the Secretary of Labor to the Equal Employment Opportunity Commission. Fair Labor Standards Act of 1938, § 6(d), as amended, 29 U.S.C.A. § 206(d); Reorganization Plan No. 1 of 1978, § 1 et seq., 42 U.S.C.A. § 2000e-4 note; 5 U.S.C.A. § 905.

Synopsis, Syllabi and Key Number Classification
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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

6. Labor Relations ⇐1477

District court had subject-matter jurisdiction of Equal Pay Act suit brought by Equal Employment Opportunity Commission alleging that defendant bank discriminated against several of its female employees by paying them less than it paid males for performance of substantially similar work. Fair Labor Standards Act of 1938, §§ 16(c), 17, as amended, 29 U.S.C.A. §§ 216(c), 217; 28 U.S.C.A. §§ 1331, 1345.

7. Labor Relations ⇐1478

Equal Employment Opportunity Commission's naming of three female assistant cashiers at defendant bank in prayer for relief section of complaint charging sex discrimination in pay in violation of Equal Pay Act satisfied the "named as party" requirement of statute defining when action commenced for limitations purposes, as did reference to the females in agency's answer to bank's interrogatories, notwithstanding that the employees were not specifically named as plaintiffs. Fair Labor Standards Act of 1938, § 16(c), as amended, 29 U.S.C.A. § 216(c); Portal-to-Portal Act of 1947, § 6, 29 U.S.C.A. § 255.

8. Labor Relations ⇐1474

Equal Employment Opportunity Commission is not required to conciliate as a precondition to filing of a suit to enforce substantive provisions of Equal Pay Act. Fair Labor Standards Act of 1938, §§ 6(d), 16, 17, as amended, 29 U.S.C.A. §§ 206(d), 216, 217.

9. Labor Relations ⇐1471

Affidavits whereby three female assistant bank cashiers named in Equal Pay Act complaint filed by Equal Employment Opportunity Commission stated that they were not aware of any sex discrimination and did not desire or authorize the agency to represent them in the action were not dispositive of the factual and legal issues involved in determining whether bank paid male employees greater amount for performing substantially equal work and it was error to dismiss action on basis of the affidavits. Fair Labor Standards Act of 1938, §§ 6(d), 16, 17, as amended, 29 U.S.C.A. §§ 206(d), 216, 217.

10. Labor Relations ⇐1233

Operative test in an Equal Pay Act case is whether a woman is paid less for a job substantially equal to a man's and test relates to job content rather than to job title or description and factored into the determination are such diverse considerations as seniority systems, merit systems, quantity or quality of work activity schemes and differentials based on any factor other than sex. Fair Labor Standards Act of 1938, §§ 6(d)(1), 16(c), 17, as amended, 29 U.S.C.A. §§ 206(d)(1), 216(c), 217.

11. Federal Civil Procedure ⇐2498

Material fact issue existed whether bank paid male employees a greater amount for performing work substantially similar to that performed by female employees, precluding summary judgment in Equal Pay Act case. Fair Labor Standards Act of 1938, §§ 6(d)(1), 16(c), 17, as amended, 29 U.S.C.A. §§ 206(d)(1), 216(c), 217.

Appeals from the United States District Court for the Northern District of Mississippi.

Before CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

The Equal Employment Opportunity Commission (EEOC) brought suit against The Hernando Bank, Inc. under the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e-17, alleging that the Bank had discriminated against several of its female employees on the basis of sex. Specifically, the EEOC claimed that the Bank paid female assistant cashiers less than it paid male assistant cashiers for the performance of substantially similar work. The EEOC brought its Equal Pay Act claims under sections 16(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. §§ 216(c), 217.

The Bank moved for summary judgment on the basis, *inter alia*, of identical affidavits executed by the three female employees named in the EEOC's initial complaint. The affidavits stated, in pertinent part: "I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire, nor have I authorized the Equal Opportunity Commission to represent me in the foregoing civil action."

Relying heavily upon the affidavits, the district court entered a summary judgment dismissing all of the EEOC's claims. The court denied the Bank's request for attorneys' fees.

The EEOC appeals the summary judgment only as it applies to the three female assistant cashiers named in its original Equal Pay Act complaint. It does not appeal the Title VII summary judgment. The Bank cross-appeals, claiming that (1) the EEOC had no power to enforce the substantive provisions of the Equal Pay Act, (2) the district court lacked subject matter jurisdiction, and (3) the district court abused its discretion in denying the Bank's request for attorneys' fees.

This appeal presents several serious questions of far reaching consequences. Concluding that the summary judgment was improvidently granted, we reverse and remand for further proceedings.

Authority of EEOC

A threshold consideration, anticipated in Hernando Bank's brief, is precipitated by the intervening decision of the Supreme Court in *INS v. Chadha*, — U.S. —, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). In *Chadha*, the Supreme Court held that the one-house congressional veto provision in § 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2), was unconstitutional because it violated the doctrine of separation of powers.

Hernando Bank alleges that *Chadha* requires us to hold that the EEOC had no authority to enforce the substantive provisions of the Equal Pay Act. Reorganization Plan No. 1 of 1978, 43 Fed.Reg. 19807, 92 Stat. 3781, *reprinted in* [1978] U.S.Code Cong. & Admin.News 9795-9800, which was promulgated under the authority delegated to the President by the Reorganization Act of 1977, 5 U.S.C. §§ 901-12, transferred the federal government's authority to enforce the Equal Pay Act from the Secretary of Labor to the EEOC. Hernando Bank argues that the Reorganization Act and all reorganization plans promulgated thereunder must be found invalid because the Reorganization Act contains a legislative veto provision similar to the one struck down in *Chadha*, *see* 5 U.S.C. § 906.[1] We do not agree.

1. Subject to certain limitations, the Reorganization Act of 1977 authorizes the President to

[1] After a close analysis of the language and legislative history of the Reorganization Act, we conclude that its unconstitutional one-house legislative veto provision is severable. We further conclude that the remainder of the Reorganization Act is constitutional and that President Carter's Reorganization Plan No. 1 of 1978 effected a valid transfer of Equal Pay Act enforcement authority from the Secretary of Labor to the EEOC.

[2] The Reorganization Act of 1977 does not contain a severability clause. Although we might infer from such legislative silence that Congress intended the provisions of the statute to be nonseverable, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n. 27, 88 S.Ct. 1209, 1218 n. 27, 20 L.Ed.2d 138 (1968). Rather, the court must inquire into whether Congress would have enacted the remainder of the statute in the absence of the invalid provision. *Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C.Cir.1982). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 109, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976), *quoting Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932).

Congressional intent and purpose are best determined by an analysis of the language of the statute in question. What reasons did Congress assign for its enactment of the Reorganization Act? Congress formally declared the Act's policy and purpose in 5 U.S.C. § 901(a):

> The Congress declares that it is the policy of the United States—
>
> (1) to promote the better execution of the laws, the more effective management of the executive branch and of its agencies and functions, and the expeditious administration of the public business;
>
> (2) to reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of the Government;
>
> (3) to increase the efficiency of the operations of the Government to the fullest extent practicable;
>
> (4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;
>
> (5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and
>
> (6) to eliminate overlapping and duplication of effort.

In 5 U.S.C. § 901(b), Congress explained that the policies of § 901(a) could best be accomplished by delegating to the President the legislative authority to reorganize the executive branch. The words of Congress are explicit:

> Congress declares that the public interest demands the carrying out of the pur-

reorganize the executive branch of the federal government by submitting plans of reorganization to both Houses of Congress. Under 5 U.S.C. § 906, a plan becomes effective if neither House objects to it within sixty days of its submission. This one-house legislative veto provision is unconstitutional under *Chadha*.

> poses of subsection (a) of this section and that the purposes may be accomplished in great measure by proceeding under this chapter, and can be accomplished more speedily thereby than by the enactment of specific legislation.

Thus Congress obviously concluded that it would be more efficient and better attuned to the public interest to delegate to the President authority to formulate the specifics of reorganization plans.

The legislative veto provision reflects Congress' desire to vote its approval of any specific reorganization plan. But there is more of relevance to our inquiry in the language of the Act. The Reorganization Act of 1977 is the first such statute in which Congress placed specific limitations upon the authority delegated. Section 905 provides that no plan may create a new executive department, abolish or transfer an executive department or independent regulatory agency, continue an agency or function beyond the time authorized by law, or authorize an agency to exercise a function not already expresely conferred by law. *See* H.R.Rep. 95–105, *reprinted in* [1977] U.S.Code Cong. & Admin.News 41.

A review of the Reorganization Act's legislative history demonstrates congressional awareness of the serious constitutional questions raised by the legislative veto. Congressman Robert Drinan doubted the wisdom of bypassing the normal legislative process and, thereby, of risking a judicial declaration of unconstitutionality. He observed that the Reorganization Act "intentionally does not contain a severability clause. The one House veto provision is deemed to be an integral and necessary part of the legislative scheme for reorganization." *Id.* at 69.

With the exception of Congressman Drinan's comments, nothing in the wording of the Act or in its legislative history indicates that Congress would not have enacted the Reorganization Act without the legislative veto provision or that Congress even considered the issue of severability.

The legislative history is replete with statements calling for efficient change in the organization of the executive branch. The House Report notes that in our constantly shifting society, "[f]unctions change, new methods are developed, bureaucratic structures become obsolete, [and] new laws are passed." *Id.* at 43–44. Congress expected the Reorganization Act to bring about organizational changes in the executive branch that would result in "cost reduction, improved management and better services to the public." *Id.* at 43.

It is clear from the legislative history that Congress undertook several steps in its drafting of the Act to "strengthen the role of Congress and help allay, in part, fears of unconstitutionality." *Id.* The substantive limitations imposed retain for Congress control over the substantive operations of the federal government. The Act does nothing more than delegate to the President the authority to reorganize the complex bureaucratic machinery of the executive branch so as to implement most effectively Congress' substantive policies.[2]

2. We perceive a significant distinction between the exercise of a one-house legislative veto, such as that held invalid in *Chadha*, and the mere presence of an unexercised legislative veto in the Reorganization Act. *Chadha* involved a situation in which Congress delegated to the Attorney General "the authority to allow deportable aliens to remain in this country in certain specified circumstances." 103 S.Ct. at 2786. By its unilateral veto of the Attorney General's deci-

Congress was acutely aware of the ongoing need for flexibility in the reorganization of the executive branch, and it adopted what it perceived to be the most efficient, expeditious means of achieving that end. In so doing, it retained, as the Constitution requires, the ultimate power to establish by legislation the substantive policies of the federal government.

[3] We conclude that the unconstitutional legislative veto provision is severable even though the Reorganization Act of 1977 contains no severability clause, because neither the express language of the statute nor the Act's legislative history makes it "evident that the legislature would not have enacted" the remainder of the Act in the absence of the legislative veto provision. *See Buckley v. Valeo*, 424 U.S. 1, 109, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976). Mere uncertainty about the legislature's intent is insufficient to satisfy the test announced in *Buckley v. Valeo*. We therefore hold that the remainder of the Act "is fully operative as a law." *Id.*

[4, 5] We further find and hold that the Reorganization Act validly delegated to the President the legislative authority to promulgate executive branch reorganization plans. Because President Carter's Reorganization Plan No. 1 of 1978 conformed to the substantive provision of the Act and did not transgress any of the limitations imposed by 5 U.S.C. § 905, the plan is enforceable as law. The plan thus effected a valid transfer of governmental authority to enforce the Equal Pay Act from the Secretary of Labor to the EEOC.

Jurisdiction

[6] Hernando Bank alleges that the district court lacked subject matter jurisdiction. We do not agree. The EEOC brought this action pursuant to sections 16(c) and 17 of the Fair Labor Standards Act, 29 U.S.C. §§ 216(c), 217. Section 17 provides that "[t]he district court ... shall have jurisdiction ... to restrain violations of section 15...."

In addition, the district court had jurisdiction under both 28 U.S.C. § 1331 and 28 U.S.C. § 1345. Section 1331 provides that "the district courts shall have original jurisdiction of all civil actions arising under the constitution, laws or treaties of the United States." A suit brought under the Equal Pay Act is obviously an action arising under a law of the United States. Section 1345 grants the district courts original jurisdiction of civil actions brought by federal agencies, such as the EEOC, that are ex-

sion to allow Mr. Chadha to remain in the United States despite an outstanding deportation order, the House of Representatives "took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." 103 S.Ct. at 2784. The Supreme Court held that once Congress delegated its legislative authority, it was obliged to honor its delegation "until that delegation is legislatively altered or revoked." 103 S.Ct. at 2786.

In the instant case, there was no congressional delegation and subsequent withdrawal of delegated legislative powers. Further, no action was taken that affected the substantive rights of any person. The challenged executive action did nothing more than transfer the federal government's responsibility for enforcing the Equal Pay Act from one executive agency to another, *i.e.* from the Secretary of Labor to the EEOC. The reorganization plan effected no substantive change in the applicable substantive legislation; indeed, 5 U.S.C. § 905 forbids any such changes.

pressly authorized to sue by an Act of Congress.[3]

Statute of Limitations

[7] The district court held that the statute of limitations [4] bars the EEOC's claims under 29 U.S.C. § 216(c) [5] because, even though employees Harris, Fuquay, and Sullivan were listed in the prayer for relief section of the EEOC's initial complaint, the EEOC did not specifically name the three as plaintiffs before the expiration of the two-year limitation period.[6] However, courts that have considered the "named as party plaintiff" requirement of 29 U.S.C. § 256, a statute very similar to § 216(c), have required merely that the employee be identified in the complaint or in a pleading equivalent to it. *E.g. Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir.1982) (Wisdom, J., sitting by designation), *citing Prickett v. Consolidated Liquidating Corp.*, 196 F.2d 67 (9th Cir.1952); *Ciemnoczolowski v. Q.O. Ordinance Corp.*, 119 F.Supp. 793 (D.Neb.1954), *affirmed*, 233 F.2d 902 (8th Cir.), *cert. denied*, 352 U.S. 927, 77 S.Ct. 226, 1 L.Ed.2d 162 (1956). The EEOC's naming of the three women in the prayer of its complaint satisfies this test, as does the agency's specific references to them in its answers to Hernando Bank's interrogatories. Therefore, the statute of limitations does not bar the EEOC's claims under § 216(c).

Conciliation as a Precondition to Litigation

[8] The district court stated in support of its grant of summary judgment that the EEOC's conciliation efforts prior to commencement of this litigation were grossly inadequate. The trial court thus implicitly

3. 28 U.S.C. § 1345 provides in full:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Hernando Bank argues that the EEOC may not invoke § 1345 jurisdiction because the Equal Pay Act authorizes the Secretary of Labor and not the EEOC to bring enforcement proceedings. The EEOC assumed its enforcement powers from the President's Reorganization Plan No. 1 of 1978 rather than from an Act of Congress. However, since a presidential reorganization plan that is not rejected becomes law, *Young v. United States*, 212 F.2d 236 (D.C.Cir. 1954), *cert. denied*, 347 U.S. 1015, 74 S.Ct. 870, 98 L.Ed. 1137 (1954), and since the application of the Reorganization Plan No. 1 of 1978 to pending litigation "contradicts neither 'statutory direction [n]or legislative history,'" *United States v. City of Miami*, 664 F.2d 435, 437 (5th Cir.1981) (en banc), *quoting Bradley v. School Bd.*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974), we hold that the EEOC was "expressly authorized to sue" under the Equal Pay Act within the meaning of § 1345.

4. 29 U.S.C. § 255 provides, in pertinent part:

> Any action commenced ... to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended ...
>
> (a) ... may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued ...

5. The EEOC sought remedies under 29 U.S.C. §§ 216(c) and 217. Hernando Bank concedes that the EEOC's § 217 claims were commenced in a timely fashion.

6. 29 U.S.C. § 216(c) provides, in pertinent part:

> In determining when an action is commenced ... under this subsection for the purposes of the statutes of limitations provided in [29 U.S.C. § 255], it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

held that the EEOC must undertake conciliation efforts before it may commence a judicial proceeding to enforce the Equal Pay Act. Although it is undisputed that the EEOC must "endeavor to eliminate any ... alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" before it may bring a judicial enforcement proceeding under Title VII, *see* 42 U.S.C. 2000e–5(b), the question whether the EEOC must do the same before it may commence such an action under the Equal Pay Act is one of first impression in this circuit. We now hold that the EEOC is not required to conciliate as a precondition to the filing of a suit to enforce the substantive provisions of the Equal Pay Act. It follows *a fortiori* that inadequate conciliation efforts present no bar to judicial proceedings.

We briefly sketch the relevant statutory history. Congress enacted the Equal Pay Act of 1963, 29 U.S.C. § 206(d), as an amendment to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* By providing that "any amounts owing to any employee which have been withheld in violation of this subsection [*i.e.* the Equal Pay Act] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the FLSA]," 29 U.S.C. § 206(d)(3), Congress intended that the Equal Pay Act be enforced in accordance with well established FLSA procedures. H.Rep. No. 309, 88th Cong., 1st Sess., *reprinted in* [1963] U.S.Code Cong. & Admin.News 687. These procedures do not include conciliation. *See* 29 U.S.C. §§ 206(d), 216, 217. When Congress amended the Equal Pay Act in 1974, it did not add a conciliation requirement, an administrative procedure that it had ordained in the intervening years when it first adopted and then expanded Title VII. *Compare* 29 U.S.C. §§ 204(f), 216(b) *with* 42 U.S.C. §§ 2000e–5(b), 2000e–16(c).

The Reorganization Act of 1977 and Reorganization Plan No. 1 of 1978 are at the end of the scenario. We find nothing in the language of the Reorganization Act, the Reorganization Plan, the message of President Carter accompanying the plan, or in the Executive Order implementing it that supports the proposition that the conciliation requirements of Title VII automatically apply to Equal Pay Act claims after the transfer. *See* the Reorganization Act and Reorganization Plan; Executive Order No. 12,144, *reprinted in* 44 Fed.Reg. 37,-193 (1979). *See also* S.Rep. No. 750, 95th Cong., 2d Sess. (1978); H.R.Rep. No. 1069, 95th Cong., 2d Sess. (1978).

Our holding today is based upon several considerations. We first note the absence of any reference to a conciliation requirement in the statutory language of the Equal Pay Act. Nothing in the legislative history suggests that this omission was due to congressional oversight or inadvertence. We are persuaded that had Congress wished to require conciliation as a prerequisite to litigation, it would have done so expressly, as it did for actions brought under both Title VII, 42 U.S.C. § 2000e–5(b), and the Age Discrimination in Employment Act, 29 U.S.C. § 626(b).

Further, a conciliation requirement would be inconsistent with the remedial scheme of the Equal Pay Act. The FLSA provides for the payment of unpaid wages, but limits an award to the two-year period (and in some instances three-year period) immediately preceding the filing of the lawsuit. 29 U.S.C. § 255(a). Under Title VII, back pay is available for the two-year period immediately prior to the commencement of administrative proceedings with the

EEOC. 42 U.S.C. § 2000e–5(g). Accordingly, the conciliation requirement of Title VII has no practical adverse effect upon that statute's remedial scheme, but the delay caused by such a requirement under the Equal Pay Act would seriously diminish, or destroy, the back pay claim it would purport to prescribe.

In addition, the legislative history reveals that the Congress considered but declined to adopt a permissive conciliation provision in the Equal Pay Act.[7] Finally, we find instructive the passing observation by the Supreme Court in *County of Washington v. Gunther*, 452 U.S. 161, 175 n. 14, 101 S.Ct. 2242, 2251 n. 14, 68 L.Ed.2d 751 (1981), that "the Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts."

Our holding today is consistent with the decisions recently reached by our colleagues in the District of Columbia Circuit, *Ososky v. Wick*, 704 F.2d 1264 (D.C.Cir. 1983), and in the Eighth Circuit, *EEOC v. Home of Economy, Inc.*, 712 F.2d 356 (8th Cir.1983).

Affidavits of Discriminatees

In granting Hernando Bank's motion for summary judgment, the district court was obviously impressed by the affidavits of the three female assistant cashiers named in the EEOC's complaint. The affidavits, which were attached to Hernando Bank's motion, stated: "I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire nor have I authorized the Equal Employment Opportunity Commission to represent me in the foregoing civil action." The three women also executed supplemental affidavits containing the same statement. The September 2, 1980 affidavit of one of the female assistant cashiers, and her supplemental affidavit dated March 25, 1981, are set out in full in the margin.[8] All three

7. The rejected provision stated in part, "If a violation is found to exist, the Secretary may, before taking further action hereunder, by informal methods of conference, conciliation, and persuasion, endeavor to eliminate ..." S.Rep. 910, 88th Cong., 1st Sess., 109 Cong.Rec. 2886, 2887 (1963).

8. AFFIDAVIT OF IMOGENE HARRIS

STATE OF MISSISSIPPI
COUNTY OF DESOTO

Personally appeared before me the undersigned authority in and for the jurisdiction aforesaid, while within my jurisdiction, Imogene Harris who, after being duly sworn by me, stated to me upon her oath as follows:

1.

My name is Imogene Harris. I am an adult resident citizen of the State of Mississippi, have personal knowledge of the facts stated herein, and, if sworn as a witness, could competently testify thereto.

2.

I am employed by the Hernando Bank. My position with the Hernando Bank is that of Assistant Cashier.

3.

It is my understanding that the Equal Employment Opportunity Commission is presently seeking relief on my behalf in a civil action styled *Equal Employment Opportunity Commission v. Hernando Bank, Inc.*, Civil Action No. DC 80–26–LS–P, on file in the United States District Court for the Northern District of Mississippi, Delta Division. It is my further understanding that said action is founded upon allegations of sex discrimination.

4.

I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire nor have I authorized the Equal Employment Opportunity Commission to represent me in the foregoing civil action.

5.

No official officer or other agent of the Hernando Bank has requested or required me to give this affidavit, instead, I initiated the contact with the bank officials regarding the necessary

Note 8—Continued

steps to terminate my involvement in this action. I have freely voluntarily and of my own volition given this affidavit without any coercion or promise of reward by any official, officer or agent of the Hernando Bank. I have been assured by officers of the Hernando Bank that no reprisal will be taken in the event I choose to have the Equal Employment Opportunity Commission continue to pursue this action on my behalf, however, I do not desire the Equal Employment Opportunity Commission to continue to maintain this action on my behalf.

6.

I hereby request that the Court terminate this action as it relates to me.

Dated this 2nd day of September, 1980.

/s/ Imogene Harris
IMOGENE HARRIS

Sworn to and subscribed before me this 2nd day of September, 1980.

/s/ Donna B. Harris
NOTARY PUBLIC

My Commission Expires:
My commission expires June 10, 1981

SUPPLEMENTAL AFFIDAVIT OF IMOGENE HARRIS

STATE OF MISSISSIPPI
COUNTY OF DESOTO

Personally appeared before me the undersigned authority in and for the jurisdiction aforesaid, while within my jurisdiction, Imogene Harris, who, after being duly sworn by me, stated to me upon her oath as follows:

1.

My name is Imogene Harris. I am an adult resident citizen of the State of Mississippi, have personal knowledge of the facts stated herein, and, if sworn as a witness, could competently testify thereto.

2.

I am employed by the Hernando Bank. My position with the Hernando Bank is that of Assistant Cashier.

3.

I am the same Imogene Harris who previously provided an affidavit in this civil action on September 2, 1980. Furthermore, I am the same Imogene Harris who was deposed by the Equal Employment Opportunity Commission on March 24, 1981. This affidavit was provided to the bank after the March 24, 1981 deposition.

4.

It is my understanding that the Equal Employment Opportunity Commission is presently seeking relief on my behalf in a civil action styled *Equal Employment Opportunity Commission v. Hernando Bank, Inc.*, Civil Action No. DC 80-26-LS-O, on file in the United States District Court for the northern District of Mississippi, Delta Division. It is my further understanding that said action is founded upon allegations of sex discrimination.

5.

I am not aware of any sex discrimination at Hernando Bank, therefore, I did not request, do not desire, nor have I authorized the Equal Employment Opportunity Commission to represent me in the foregoing civil action.

6.

No official, officer, or other agent of the Hernando Bank has requested or required me to give this supplemental affidavit. Instead, I initiated the contact with the bank officials regarding the necessary steps to terminate my involvement in this action. I have freely, voluntarily and of my own volition given this affidavit without any coercion or promise of reward by any official, officer or agent of the Hernando Bank. I have been assured by officers of the Hernando Bank that no reprisal will be taken in the event I choose to have the Equal Employment Opportunity Commission continue to pursue this action on my behalf, however, I do not desire the Equal Employment Opportunity Commission to continue to maintain this action on my behalf.

7.

On March 24, 1981, I discussed this case with the attorneys for the Hernando Bank. My discussions with the bank's attorneys were voluntary. The bank's attorneys explained my involvement in this civil action and I was permitted to ask any questions I wished to ask. I was assured by the attorneys that no reprisal will be taken in the event I choose to have the Equal Employment Opportunity Commission continue to pursue this action on my behalf, however, as I previously stated to the bank's officials, I do not desire the Equal Employment Opportunity Commission to continue to maintain this action on my behalf.

8.

Based on the foregoing facts I hereby reaffirm and renew my request of September 2, 1980, that the Court terminate this action as it relates to me.

Dated this 25 day of March, 1981.

/s/ Imogene Harris
IMOGENE HARRIS

affidavits are identical, as are all three supplemental affidavits.

[9, 10] In finding that these affidavits rendered the EEOC "powerless to prosecute a suit" under either section 16(c) or 17 of the FLSA, 29 U.S.C. §§ 216(c), 217, the district court accorded inordinate weight to them. This was error. The affidavits are material, but they are not dispositive of the factual and legal issues involved in the determination of whether Hernando Bank complied with the congressional directives contained in the Equal Pay Act. Like the affidavits, the Equal Pay Act speaks of discrimination, but it does so in terms that may not appear to be discrimination to a layman. The Equal Pay Act obliges an employer to provide equal pay for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). The operative test is whether a woman is paid less for a job "substantially equal" to a man's; the test relates to job content rather than to job title or description. *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041 (5th Cir.1973). Factored into the court's determination are such diverse considerations as seniority systems, merit systems, quantity or quality productivity schemes, and differentials based on any factor other than sex. 29 U.S.C. § 206(d)(1). The court's inquiry is often complicated and oblique. A proper determination demands far more than the mere conclusional attestation by the alleged discriminatees that they are not aware of any discrimination.

Note 8—Continued

Sworn to and subscribed before me this 25th day of March, 1981.

/s/ Lola H. Robison
NOTARY PUBLIC

My Commission Expires:
My Commission Expires July 23, 1983.

Summary Judgment

Under Fed.R.Civ.P. 56, the district court may grant a summary judgment only if "there is no genuine issue as to any material fact." In determining whether there is a genuine fact issue, the court must review "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." We addressed the specifics of summary judgment in *Keiser v. Coliseum Properties, Inc.*, 614 F.2d 406, 410 (5th Cir.1980), and held:

> The burden of proof falls on the party seeking summary judgment, and any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. (Citations omitted.) We note that a court can only enter a summary judgment if *everything* in the record—pleadings, depositions, interrogatories, affidavits, etc.—demonstrates that no genuine issue of material fact exists. Rule 56 does not distinguish between documents merely filed and those singled out by counsel for special attention—the court must consider both before granting a summary judgment.

After reviewing all of the record now before us, we find that there was a substantial differential in the pay of male and female assistant cashiers throughout the entire relevant time period. No female assistant cashier at Hernando Bank has ever been paid as much as any male assistant cashier. Indeed, one male assistant cashier who received an unfavorable performance rating and was reassigned to a lower position as "courier," continued to receive a

higher salary than all of the female assistant cashiers.

[11] The record includes several descriptions of the duties of various assistant cashiers. While some were responsible for the general ledger, vault supervision, and customer assistance, others balanced accounts and supervised other employees. All assistant cashiers, male and female, rotated among the various functions. Whether Hernando Bank paid different amounts to females than it paid to males for substantially equal job assignments is a disputed question of fact on the record before us. Because this disputed issue is material to the EEOC's Equal Pay Act claims, the summary judgment should not have been granted.

It necessarily follows that there is no basis for Hernando Bank's cross-appeal for attorneys' fees.

The judgment of the district court is REVERSED, the grant of summary judgment is vacated and the matter is REMANDED for further proceedings consistent herewith.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

FILED
MAR 5 1984
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

RECEIVED
3.7.84

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

PLAINTIFF

VS. CIVIL ACTION NO.

MARTIN INDUSTRIES, INC., 83-AR-5699-NW

DEFENDANT

ENTERED
MAR 5 1984

MEMORANDUM OPINION AND ORDER

Equal Employment Opportunity Commission (EEOC) has filed a motion to alter or to amend the final judgment of February 24, 1984. EEOC correctly points out that on February 13, 1984, the Fifth Circuit in EEOC v. Hernando Bank, Inc., at p. 2053 of its slip opinion, manifests a disagreement with Judge Barbour's reasoning in EEOC v. Allstate, the decision which this Court has found persuasive.

While this Court has great respect for the Fifth Circuit, this Court is not controlled by the Fifth Circuit. In this Court's opinion of February 24, 1984, it took "its stand with Judge Barbour unless and until the Eleventh Circuit or the Supreme Court finds a way around Chadha". (emphasis supplied). This Court has carefully read Hernando Bank, and still finds itself on the side of Judge Barbour. This Court fails to see how the Fifth Circuit can ignore the strong, if not the predominant, congressional purpose of maintaining strings on the rule-making function of the executive agencies. The word "reorganization" used by Congress in the heading of the Reorganization Act does not mean "partial reorganization" nor "reorganization except where we may violate the 'separation of powers'." The Reorganization Act was a comprehensive, integrated scheme, and not a "take your pick" list of

reforms. At p. 2057 of its slip opinion in Hernando Bank the Fifth Circuit says:

> A review of the Reorganization Act's legislative history demonstrates congresssional awareness of the serious constitutional questions raised by the legislative veto. Congressman Robert Drinan doubted the wisdom of bypassing the normal legislative process and, thereby, of risking a judicial declaration of unconstitutionality. He observed that the Reorganization Act "intentionally does not contain a severability clause. The one House veto provision is deemed to be an integral and necessary part of the legislative scheme for reorganization". Id at 69.
>
> With the exception of Congressman Drinan's comments, nothing in the wording of the Act or in its legislative history indicates that Congress would not have enacted the Reorganization Act without the legislative veto provision or that Congress even considered the issue of severability. (emphasis supplied).

Congressman Drinan was very perceptive and very accurate in his understanding of the mood of Congress. His warning is echoed by Mr. Justice White in Chadha. He was certainly in a much better position to assess congressional intent than is a court now looking for a way to avoid toppling those parts of the Reorganization Act, which, if they topple, create the very problem which Congressman Drinan pointed out and which Congress intended to make the courts face. It is condescending of the Fifth Circuit to assume that Congress is so unsophisticated that it does not recognize the office of a severability clause and intended to delegate to the courts the question of which provisions of the Act should be implemented. Here Congress ostentatiously left out a severability clause, manifesting its intent to hang the entire legislative scheme on the constitutionality of all of its various parts, specifically including the important legislative veto. Congress had a perfect right to do what it did, even if its intention has the effect of causing trouble and tweaking the nose of the judiciary.

This Court reiterates. It is willing to take its stand with Judge Barbour unless and until the Eleventh Circuit or the Supreme Court finds a way around

Chadha. Therefore, EEOC's motion to alter or to amend the final judgment is DENIED.

DONE this 5th day of March, 1984.

William M. Acker, Jr.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

No. 83-1021

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

ALLSTATE INSURANCE COMPANY,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

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ALLSTATE INSURANCE COMPANY'S PARENT, AFFILIATES AND SUBSIDIARIES

Defendant-appellee Allstate Insurance Company's parent corporation is Sears, Roebuck and Co. Allstate's affiliates and subsidiaries (except for its wholly-owned subsidiaries, the wholly-owned subsidiaries of Sears, Roebuck and Co. and the wholly-owned subsidiaries of their subsidiaries and wholly-owned subsidiaries) are Allstate Insurance Company of Canada; Allstate Life Insurance Company of Canada; The Armstrong Rubber Company; Copolymer Rubber and Chemical Corporation; DeSoto Inc.; Kellwood Company; Roper Corporation; Sears, Roebuck de Mexico, S.A. de C.V.; Simpson-Sears Limited; Inglis Limited; Simpson-Sears Acceptance Co., Ltd.; Simpson-Sears Properties Ltd.; and Universal-Rundle Corp. "Affiliates" listed above are those which Allstate included as of December 31, 1982 in Item 2 of the Registration Statement which Allstate is required to file in its domiciliary state to comply with the Insurance Holding Company Systems Act, Ill. Ann. Stat., Ch. 73, § 743.1 *et seq.* Affiliates whose assets are not greater than one-half (1/2) of 1% of Allstate's assets are not included in Item 2 of the Registration Statement. An Investment Schedule listing affiliates whose assets are less than one-half of 1% of Allstate's assets is available upon request.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

ALLSTATE INSURANCE COMPANY,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee Allstate Insurance Company moves that this Court exercise its jurisdiction and affirm the judgment of the District Court on the ground that the question presented is so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

1. Whether this Court's jurisdiction under 28 U.S.C. 1252 is properly invoked where the Equal Employment Opportunity Commission seeks review of the invalidation of its Equal Pay

Act enforcement authority which necessarily followed from the decision below that the Reorganization Act of 1977 is unconstitutional.

2. Whether the unconstitutionality of the Reorganization Act of 1977 invalidates the transfer of Equal Pay Act enforcement authority to the Equal Employment Opportunity Commission effected pursuant to the Reorganization Act.

STATEMENT

The Equal Employment Opportunity Commission ("EEOC") brought this action against Allstate Insurance Company ("Allstate") seeking to enforce Section 6(d) of the Fair Labor Standards Act, 29 U. S. C. 206(d), commonly known as the Equal Pay Act. When the Equal Pay Act was enacted in 1963 (Pub. L. No. 88-38, 77 Stat. 56), authority for its enforcement was vested in the Secretary of Labor. Reorganization Plan No. 1 of 1978 (92 Stat. 3781), promulgated pursuant to the Reorganization Act of 1977, 5 U. S. C. 906, purported to transfer that authority from the Secretary of Labor to the EEOC.

An integral component of the Reorganization Act was a one-house legislative veto provision virtually identical to that held unconstitutional in *Immigration and Naturalization Service* v. *Chadha*, ____ U. S. ____, 51 U. S. L. W. 4907 (June 23, 1983). Since the EEOC's authority in the instant case had been derived from such unconstitutional legislation, Allstate moved for summary judgment. On August 19, 1983, the District Court granted that motion holding the Reorganization Act unconstitutional in its entirety and concluding that the EEOC "has no authority to act as Plaintiff in this cause" or otherwise enforce the Equal Pay Act. J.S. App. 19a. The EEOC then filed a timely notice of appeal to this Court invoking this Court's

jurisdiction under 28 U. S. C. 1252. Thereafter, the EEOC also filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit.[1]

[1] On November 23, 1983, Allstate filed a motion to dismiss the EEOC's Fifth Circuit appeal on the ground that the courts of appeals are divested of 28 U. S. C. 1291 jurisdiction in cases, such as the instant case, where direct review may be had in this Court pursuant to 28 U. S. C. 1252. The EEOC filed its opposition to the motion to dismiss on December 5, 1983. On January 9, 1984, the Fifth Circuit denied Allstate's motion to dismiss; however, that court ordered the appeal before it stayed pending this Court's resolution of the jurisdictional question. *EEOC* v. *Allstate*, appeal pending, No. 83-4652 (5th Cir.).

ARGUMENT

THIS COURT HAS JURISDICTION UNDER 28 U. S. C. 1252

Section 1252 provides for direct review by the Supreme Court of an "interlocutory or final judgment, decree or order of any court of the United States" in a "civil action, suit or proceeding" to which an agency of the United States is a party where the decision holds an Act of Congress unconstitutional. Each of these prerequisites has been satisfied in the instant case. The judgment appealed from is a final order of a United States District Court in a civil action; the action was brought by an agency of the United States, the EEOC; and the District Court's judgment held the Reorganization Act of 1977, an Act of Congress, unconstitutional.

The EEOC nonetheless contends that, for the same reasons the government has advanced in *Heckler* v. *Edwards,* No. 82-874 (argued Nov. 30, 1983), its appeal lies in the court of appeals rather than this Court. J.S. 6. The jurisdictional issue in this case, however, differs significantly from that in *Edwards.* The EEOC is incorrect, therefore, in contending (J.S. 8) that *Edwards* is controlling, and the instant appeal properly lies in this Court.

In *Edwards,* the government had conceded every question involving constitutionality; as a result, it argued that no direct appeal was required because the lower court's constitutional holding was not "subject to review and possible reversal on appeal." Brief for the Government in *Edwards* ("Govt. Br."), at 27, 35. In the present case, in contrast to *Edwards* (Govt. Br. 6), the government continues to "defend the constitutionality" of the Reorganization Act. As a result, contrary to the assertion of the EEOC (J.S. 7), this dispute involves far more than merely the relief ordered by the District Court. The court below concluded, correctly as appellee will demonstrate *infra,* that the one-house veto provision was "an integral and inseparable part of the entire [Reorganization] Act" and that,

accordingly, "the entire Act must be held unconstitutional . . . ." J.S. App. 13a-14a. Nonetheless, in its jurisdictional statement, the EEOC argues that, although the legislative veto provision in the Act is unconstitutional, that provision is severable and thus does not affect the constitutionality of the Act as a whole. J.S. 9-10, n. 5. The critical controversy here continues to be the very question which the government has argued is no longer at issue in *Edwards*: "the binding effect of the constitutional holding on the Executive Branch's administration of the law." Govt. Br. 12.

Moreover, unlike *Edwards*, where the government had conceded unconstitutionality in an action that would affect "the nationwide administration of the law" (Govt. Br. 31-32), the EEOC has continued to assert its "authority" to lawfully enforce the Equal Pay Act, as well as to administer the Age Discrimination in Employment Act ("ADEA")[2] and perform all of the other functions transferred to that agency by the Reorganization Act. J.S. 3, n. 2. This distinction is also crucial. The purpose of 28 U. S. C. 1252 is admittedly "to assure an expeditious means of removing the restraint on the federal government's administration of the law when it would be bound by a holding that the law in question is unconstitutional. . . ." Govt. Br. 21. In this case, direct review by this Court is the only means to effectuate that goal and obtain a ruling of nationwide effect as to whether the con-

[2] See, *e.g.*, *Muller Optical Co.* v. *EEOC*, No. 83-2836 (W. D. Tenn. Nov. 10, 1983), appeal pending No. 83-5889 (6th Cir.); *EEOC* v. *Pan American World Airways*, No. M18-304 (S. D. N. Y. Oct. 26, 1983); *EEOC* v. *Michigan Wisconsin Pipeline*, CA No. CV 82-0626 (W. D. La., Nov. 29, 1983). Indeed, as of January 4, 1984, challenges to the EEOC's enforcement authority had been raised in 67 separate lawsuits: 26 Equal Pay Act cases and 41 ADEA cases. It is clear, therefore, as the EEOC has stated to the Fifth Circuit in this case, "the uncertainty created by the decision below is causing long and damaging delays in the enforcement of two important federal civil rights statutes." EEOC Opposition to Appellee's Motion to Hold Briefing in Abeyance at 3-4.

stitutional restraint that has been imposed on the EEOC's administration of the Equal Pay Act is appropriate. There is no reason, therefore, to hold this case pending the resolution of *Edwards*. Regardless of the disposition of that matter, here the "purpose of § 1252 is too plain to allow circumvention." *McLucas* v. *DeChamplain*, 421 U. S. 21, 31 (1975).[3]

THE QUESTION RAISED BY THIS APPEAL IS NOT SUBSTANTIAL AND SUMMARY AFFIRMANCE THEREFORE IS APPROPRIATE

The substantive question presented by this appeal is whether the District Court correctly concluded that the unconstitutionality of the Reorganization Act of 1977 nullifies the transfer of Equal Pay Act enforcement authority to the EEOC pursuant to that Act. The decision below is plainly correct, rests on well-settled legal principles, and does not present any substantial question requiring this Court's plenary consideration.

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[3] *Montana Contractors' Association* v. *Kreps*, 442 U. S. 935 (1979), the primary authority relied upon by the government in *Edwards* (Govt. Br. at 15-17), further illustrates the difference between that case and the present dispute. This Court properly dismissed that appeal for want of jurisdiction because no constitutional issue was presented for review. The Montana Contractors' Association did not appeal from the district court decision holding the minority business enterprise set-aside provision unconstitutional, *Montana Contractors' Association* v. *Secretary of Commerce*, 460 F. Supp. 1174 (D. Mont. 1978). Instead, it appealed from a later court order denying the Association's prayer for injunctive relief. See *Montana Contractors' Association* v. *Kreps*, 442 U. S. 935 (1979), Juris. Statement, Appendices C, J. The appeal in that case, therefore, clearly failed to satisfy the requirement of 28 U. S. C. 1252 that the appeal be from an order "holding an Act of Congress unconstitutional." In the instant case, by contrast, direct review under 28 U. S. C. 1252 is proper because this appeal has been taken from a district court judgment that the Reorganization Act of 1977 is unconstitutional in its entirety.

1. As the EEOC now admits, the District Court correctly concluded that under this Court's decision in *Chadha,* the legislative veto provision of the Reorganization Act is unconstitutional. The general presumption is, of course, that where, as here, there is no severability clause, "the Legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it." *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 312 (1936). In addition, it is evident in this case "that the legislature would not have enacted those provisions which are within its powers, independently of that which is not." *Chadha,* 51 U. S. L. W. 4911. The legislative history of the Reorganization Act was carefully reviewed by the District Court. J.S. App., 10a-14a. That history demonstrates that "a major objective of the sponsors" was to provide Congress with a "considerable degree of participation in the reorganization process."[4] And, despite substantial awareness of the doubtful constitutionality of the one-house legislative veto provision (J.S. App. 10a) Congress rejected a modified severability amendment[5] so that

[4] H. R. Rep. No. 95-105, 95th Cong., 1st. Sess., reprinted in 1977 U. S. Code Cong. & Ad. News 41-63, at 42, 48, 56. See also, *e.g.,* the remarks of Congressman Drinan that the "one house veto provision is deemed to be an integral and necessary part of the legislative scheme for reorganization. That is a proposition to which all agree" (1977 U. S. Code Cong. & Ad. News 69); Congressman Kazen, one of the bill's original co-sponsors, who stressed that "some degree of participation" was being retained by Congress and that the legislative veto was "an important and meaningful provision" to allow Congress not to "forfeit its constitutional role on the question of reorganization" (123 Cong. Rec. 9345 (Mar. 29, 1977)); and Congressman Fascell, who similarly stressed the retention of "substantial congressional control over reorganization" afforded by the legislative veto provision (123 Cong. Rec. 9348 (Mar. 29, 1977)).

[5] 123 Cong. Rec. 9363, 9365 (Mar. 29, 1977). The proposed amendment purported to limit the relief which a court might grant to holding only the reorganization plan before it unconstitutional, rather than all plans adopted under the Act.

there would be "no question whatsoever that [Congress] intend[ed] that a single house of the Congress would have the authority at any given time to vote to disapprove a single plan of the president."[6] In light of this history, which the Jurisdictional Statement does not dispute, "[v]oiding the one-house veto as unconstitutional while leaving presidential authority [under this Act] intact would increase the President's power . . . far beyond the intention of Congress," *McCorkle* v. *United States*, 559 F. 2d 1258, 1262 (4th Cir. 1977), *cert. denied*, 434 U. S. 1011 (1978). The District Court correctly concluded that "the one-house veto provision was enacted as an integral and inseparable part of the entire Act" (J.S. App. 13a) which rendered the Act, as well as presidential action taken pursuant thereto, invalid.

2. The EEOC argues that the legislative veto in this case is less constitutionally offensive than that in *Chadha* because neither House of Congress exercised its veto power with respect to Reorganization Plan No. 1. Congressional silence, it contends, "may be taken as approval of the Executive action involved." J.S. 10. This argument was expressly rejected in *Chadha*. As this Court made clear, "[t]o allow Congress to evade the strictures of the Constitution and in effect enact Executive proposals into law by mere silence cannot be squared with Art[icle] I." *Chadha*, 51 U. S. L. W. at 4918, n. 22.

The same answer applies to the various other ingenuous arguments that the EEOC invokes to validate Reorganization Plan No. 1—the resolutions of disapproval procedure incorporated into the Reorganization Act; the provision in the Reorganization Act that, absent a veto, a plan would be "effective;" the printing of a plan in the Statutes at Large; and the exercise of authority here by the President rather than a subordinate representative of the Executive. J.S. 11-13. None of these contentions can withstand post-*Chadha* constitutional scrutiny. Affirmative bicameral action and presentment are

[6] 123 Cong. Rec. 9364 (Mar. 29, 1977) (remarks of Congresswoman Jordan).

constitutional requirements which the Framers deemed essential "to protect the people from the improvident exercise of power by mandating certain prescribed steps." *Chadha,* 51 U. S. L. W. at 4918. "The[se] explicit prescription[s] for legislative action contained in Art[icle] I cannot be amended by legislation." *Id.* at 4918, n. 22.[7]

3. The EEOC's argument that the subsequent appropriation of funds to the EEOC to enforce the Equal Pay Act constitutes "explicit ratification" of the transfer of authority to the Commission (J.S. 13) similarly disregards the admonition of *Chadha* that the legislative steps outlined in Article I "are not empty formalities." 51 U. S. L. W. at 4918, n. 22. Such action cannot substitute for an explicit transfer of enforcement authority through affirmative legislation by both Houses of Congress.[8] Initially, "there is more than a passing distinction between substantive legislation and appropriation bills." *Pacific Legal Foundation* v. *Goyen,* 664 F. 2d 1221, 1226 (4th Cir. 1981). Moreover, in "voting on appropriation measures, legislators are

[7] Nor can the strictures of Article I be amended or avoided by Executive action. The EEOC nonetheless argues that because the Reorganization Plan was an action of the President, rather than a subordinate Executive officer, "special stature and finality [should be accorded to the] completed reorganization plan." J.S. 12. The short answer to this argument is that an Executive action taken pursuant to a purported delegation of legislative authority is judged not by who takes the action, but rather by the constitutionality of the delegation of power. Since *Marbury* v. *Madison,* 1 Cranch 137 (1803), the principle has been well-settled that it is this Court, not the Executive, which sits in judgment on the constitutionality of that delegation.

[8] Indicative of the EEOC's disregard of this principle is its reliance upon post-*Chadha* appropriations "to remove any doubt about whether Congress intends for the Commission to enforce the Equal Pay Act despite the latent legislative veto defect in the Reorganization Act." J.S. 14. That argument is clearly specious. Congressional refusal to comply with *Chadha,* whether in appropriation bills or otherwise (see Tolchin, *In Spite of the Court, the Legislative Veto Lives On,* N. Y. Times, Dec. 21, 1983, at 14, col. 3), cannot infuse constitutional validity to otherwise infirm legislation.

entitled to operate under the assumption that the funds will be devoted to purposes which are lawful." *Tennessee Valley Authority* v. *Hill*, 437 U. S. 153, 190 (1978). The mere appropriation of funds for the EEOC thus begs the underlying question of whether Congress, in fact, legislated lawfully. And finally, the EEOC's ratification argument contravenes the requirement of *Chrysler Corp.* v. *Brown*, 441 U. S. 281 (1979), that there must be a sufficient "nexus" between Executive action and a "*statutory* grant of authority" so that a reviewing court can "reasonably be able to conclude that the grant of authority contemplate[d]" the action in question. *Id.* at 304, 306, 308. No such "nexus" can be found between the Reorganization Plan and any of the subsequent statutory enactments which the EEOC argues have "ratified" the President's delegated authority under the Reorganization Act. In the absence of such a "nexus" the Reorganization Plan could not have been "enacted" pursuant to a constitutional delegation of legislative authority.[9]

4. Contrary to the position of the EEOC (J.S. 15-16), the court below, in determining that its decision should be applied retroactively (J.S. App. 14a-17a), properly applied the three-prong test of *Chevron Oil* v. *Huson*, 458 U. S. 50 (1982). While all three of the considerations enunciated in that case "must be

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[9] While in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297 (1937), and *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139 (1937), cited by the EEOC (J.S. 13 and n. 7), the enactment of a subsequent lawful statute constituted sufficient ratification of a prior unauthorized transfer of agency authority, in both decisions the subsequent lawful statute expressly stated that "the functions of the former Shipping Board are referred to as 'now vested in the Department of Commerce.'" *Isbrandtsen-Moller*, 300 U. S. at 148. In contrast, neither the appropriation bills nor Congress' passing reference in the Civil Service Reform Act to Reorganization Plan No. 1, contains any explicit validation of the prior unlawful Reorganization Act. *Fleming* v. *Mohawk*, 331 U.S. 111 (1947), also cited by the EEOC (J.S. 13 n. 7) is similarly inapposite since in *Fleming*, unlike here, an already existing statute was construed to grant the President authority for his actions.

shown to favor prospective-only application before a decision will be denied retroactive effect" (*Valencia* v. *Anderson Bros. Ford*, 617 F. 2d 1278, 1289 (7th Cir. 1980)), none of those factors favors prospective-only application in this case.

First, the invalidity of the one-house legislative veto was "clearly foreshadowed" at the time the President purported to transfer Equal Pay Act enforcement authority to the EEOC. The Reorganization Act was passed by a Congress well aware that the one-house veto raised grave constitutional doubts. Thus, the EEOC's reliance on the fact that the purported transfer of authority pre-dated this Court's decision in *Chadha* is misplaced. Indeed, the retroactive application given to this Court's holding in *Chadha* repudiates the contention that the unconstitutionality of the one-house veto was not "clearly foreshadowed."

Second, retroactive application in this case will further *Chadha*'s holding that one-house legislative veto provisions violate the most fundamental principles of the Constitution. Absent retroactive application, as the District Court noted (J.S. App. 16a), the EEOC will be encouraged "to pursue other similar suits in spite of its lack of a constitutionally sound grant of statutory authority to do so." Only retroactive application can effectively force Congress to confront the issue of providing the EEOC with constitutional authority to enforce the Equal Pay Act.[10]

Third, retroactive application will not produce the "manifestly inequitable results" feared by the EEOC. J.S. 16. As noted by the District Court, "[t]he Equal Pay Act includes a

[10] Retroactive application is particularly important in light of both the evidence that Congress has virtually ignored this Court's denouncement of the one-house legislative veto device in *Chadha* (see Tolchin, *In Spite of the Court, the Legislative Veto Lives On*, N. Y. Times, Dec. 21, 1983, at 14, col. 3) and the EEOC's uninterrupted role in performing the functions impermissibly delegated to that agency by Reorganization Plan No. 1 (see note 2, *supra*).

provision for individuals to sue in their own right." J.S. App. 16a. Moreover, despite its awareness of the potential constitutional infirmity underlying its enforcement authority, the EEOC has taken no action since *Chadha* to obtain either express legislative authority to enforce the Equal Pay Act or the cooperation of the Secretary of Labor.[11] Instead the Commission has devoted its resources to subverting the very "public interest in administrative stability" (J.S. 16) about which it now expresses concern by administering the Equal Pay Act as if the decision below did not exist.[12] The EEOC should not be heard to complain of any "inequity" which may result from its own chosen course.

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[11] One possible solution to the EEOC's feared "disrupt[ion]" of "a substantial number of pending cases" (J.S. 16) could be that suggested by *EEOC* v. *Pan American World Airways*, No. M18-304 (S. D. N. Y. Oct. 26, 1983), in which the court ruled that, because of its doubt as to the validity of the EEOC's enforcement authority, it would not enforce an EEOC subpoena in an ADEA investigation unless the subpoena was co-signed by the Secretary of Labor. The EEOC has refused to adopt such a procedure, or take any other similar action, on its own.

[12] See note 2, *supra*.

CONCLUSION

For the foregoing reasons, this Court should exercise its jurisdiction under 28 U. S. C. 1252 and affirm the judgment of the District Court.

Respectfully submitted,

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APPENDIX A

Tolchin, *In Spite of the Court, the Legislative Veto Lives On*, N.Y. Times, Dec. 21, 1983, at 14, col. 3.

By MARTIN TOLCHIN
Special to The New York Times

WASHINGTON, Dec. 20 — The legislative veto is alive and well, contrary to a Supreme Court decision and a raft of obituaries.

It continues to thrive in a number of laws recently passed by Congress and signed by President Reagan. The laws may be legally questionable, experts say, but the fact is that the two branches of Government have found agreement on the need for such statutes in certain instances.

"It's like the Queen Mary," said Stanley M. Brand, former counsel to the clerk of the House of Representatives. "You can't turn it around that quickly."

A legislative veto is a 50-year-old device that allows one or both houses of Congress, or even a committee, to block an action of the President or an administrative agency. The veto was held unconstitutional last June when the Supreme Court ruled that it constituted an unwarranted Congressional intrusion into the powers of the executive branch.

Justice Powell's Comment

There were 120 vetoes on the books at the time. Associate Justice Lewis F. Powell Jr. said that the decision, I.N.S. v. Chadha, "apparently will invalidate every use of the legislative veto" and that "the breadth of this holding gives one pause."

Since the Supreme Court decision, several laws containing legislative vetoes have been enacted, including the following:

The appropriations bill for the Department of Housing and Urban Development and independent agencies gained final Congressional approval six days after the decision, on June 23, and was signed into law on July 12.

It held, among other things, that construction grants by the Environmental Protection Agency were subject to prior committee approval; that the National Aeoronautical and Space Administration needed committee approval before authorizing the leasing or construction of facilities, and that the Federal Home Loan Bank Board needed committee approval before transferring earmarked expenses.

The supplemental appropriations bill, signed on July 30, provided that committee approval was required before certain funds could be paid by the Army Corps of Engineers or before the Interior Department could terminate certain programs.

The Caribbean Basin Economic Recovery Act, signed on Aug. 5, provided that the President could suspend duty-free treatment and proclaim a special duty rate for Caribbean nations, subject to a Congressional veto.

The appropriations bill for the Trnasportation Department, signed Aug. 15, provided that expenditure of funds for Washington's Union Station needed prior Congressional approval, as did certain actions of the Federal Aviation Administration.

A stopgap spending bill approved last October provided that committee approval was required before the Administration could transfer foreign assistance funds from one category to another. Without such a provision, the Administration would be required to obtain full Congressional approval for such a transfer.

Before the Supreme Court decision, legislative vetoes were often opposed by the White House. Those enacted since have been the result of compromises, usually involving how various sums of money are to be spent.

Presidential Disclaimers

Administration officials say the President signed many of the new bills with disclaimers concerning legislative vetoes. Should there ever be a showdown with a committee, they say, the Administration would not feel bound by the legislative veto provisions. However, the officials concede that because Administration agencies will have to return to Congressional committees to seek funds in future years, the agencies have generally been respectful of committee opinions, whether or not they have the force of law.

The Reagan Administration has no intention of testing such legislation, so long as the compromises hold up, according to Administration officials. Private citizens and organizations may react differently, however.

Last week, arguments were heard in Federal District Court here in a case involving a legislative veto invoked last August by the House Interior Committee. The committee approved a resolution that sought to block the Interior Department from signing a coal-leasing agreement for Federal lands in Montana and North Dakota. Last October, the President signed a stopgap spending bill that incorporated the resolution.

'Are They Constitutional?'

The lawsuit was brought by the National Wildlife Federation and the Wilderness Society, which want to stop the lease sale.

"It may come as a surprise to some observers in town that Congress has continued to enact legislative vetoes after the Chadha decision," said Louis Fisher, a specialist in the Government division of the Congressional Research Service of the Library of Congress, who has written extensively about the legislative veto.

"Are they unconstitutional?" Mr. Fisher asked rehetorically of the post-Chadha legislative vetoes. "By the court's definition they are. Will this change the behavior between committees and agencies? Probably not."

Mr. Fisher predicts that the agencies will, in effect, tell Congress, "As you know, this law is unconstitutional." Then, after everyone agrees, they will all abide by the new law.

"It makes sense for both branches," Mr. Fisher added. "It's a web of understandings and relationships that goes back decades. The legislative veto gives the President a fast track. Without access to the legislative veto, why should members of Congress want to grant a fast-track process to the President?"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

ALLSTATE INSURANCE COMPANY
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

SUPPLEMENTAL MEMORANDUM FOR THE APPELLEE

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SUPPLEMENTAL MEMORANDUM FOR THE APPELLEE

Pursuant to Rule 16.6 of the Rules of this Court, the appellee, Allstate Insurance Company ("Allstate"), respectfully submits this supplemental memorandum to address the relationship between this appeal and the recent decision of the Fifth Circuit in *EEOC v. Hernando Bank, Inc.*, No. 82-4298 (5th Cir. Feb. 13, 1984),[1] and to correct certain misperceptions advanced by the appellant.

The appellant's Supplemental Memorandum incorrectly contends that the decision in *Hernando Bank* "will control the Commission's alternative appeal to the Fifth Circuit in the instant case" (Supp. Memo. at 3) and, accordingly, that

[1] Copies of the *Hernando Bank* opinion have been lodged with the Clerk of this Court by the appellant.

Hernando Bank obviates the need for this Court to exercise its 28 U.S.C. 1252 jurisdiction in this case. For the reasons stated below, both of these contentions are without merit.

First, this Court's jurisdiction under 28 U.S.C. 1252 is in no way abrogated by *Hernando Bank*. Section 1252 jurisdiction is properly invoked where, as here, a district court has held an Act of Congress unconstitutional. Motion to Affirm at 4-6. Whether a decision by the Court of Appeals would resolve the issue more promptly is wholly irrelevant. Once the appellant has properly invoked this Court's jurisdiction under Section 1252 that jurisdiction is mandatory, and the courts of appeals are affirmatively divested of jurisdiction. See 28 U.S.C. 1291.

Second, far from obviating the need for this Court to decide the constitutional issue presented by the instant appeal, *Hernando Bank* underscores Allstate's argument (Motion to Affirm at 5) that appellant EEOC continues to assert its authority to enforce the Equal Pay Act despite the lower court's constitutional holding. This Court provides the only means, therefore, of reviewing "the restraint on the federal government's administration of the law" imposed by the decision below. The definitive answer on the constitutional question here at issue must come from this Court, not the Fifth Circuit.

Finally, to the extent that the appellant relies upon *Hernando Bank*'s resolution of the underlying constitutional question, that case was wrongly decided.[2] The Fifth Circuit held that the one-house veto provision in the Reorganization Act was severable because "[w]ith the exception of Congressman

[2] Indeed, it appears from the record of *Hernando Bank* in the Fifth Circuit that the constitutional question of the EEOC's authority to enforce the Equal Pay Act was neither briefed nor argued before that court. In light of this record, it may be questioned whether, as the Solicitor General asserts, "[t]he decision in *Hernando Bank* adds the *considered judgment* of an appellate court" (Supp. Memo. at 3, emphasis added) as to the constitutional question presented in the instant case.

Drinan's comments, nothing in the wording of the Act or in its legislative history indicates that Congress would not have enacted the Reorganization Act without the legislative veto provision or that Congress even considered the issue of severability." *EEOC* v. *Hernando Bank*, slip op. at 2057. In so holding, the Fifth Circuit overlooked a considerable body of legislative history which conclusively demonstrates that the legislative veto provision was intended to be an integral and essential element of the Reorganization Act. See Motion to Affirm at 7-8 and nn. 4, 5.

For the foregoing reasons, Allstate submits that this Court's jurisdiction over the instant case is unaffected by *Hernando Bank*, and that *Hernando Bank* is neither controlling nor persuasive authority on the constitutional question of whether the EEOC possesses lawful authority to enforce the Equal Pay Act.

Respectfully submitted,

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APPELLANT

v.

ALLSTATE INSURANCE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE APPELLANT

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In the Supreme Court of the United States

OCTOBER TERM, 1983

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT

v.

ALLSTATE INSURANCE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

REPLY BRIEF FOR THE APPELLANT

1. With respect to this Court's jurisdiction, appellee does not dispute our submission in *Heckler* v. *Edwards*, No. 82-874 (argued Nov. 30, 1983), that a direct appeal may not be taken to this Court under 28 U.S.C. 1252 if the appellant does not challenge the district court's holding that a provision of an Act of Congress is unconstitutional but instead challenges only the relief ordered by the district court. Appellee instead argues that this case is distinguishable from *Edwards* because here the Commission does seek review of the lower court's constitutional holding. Mot. to Aff. 4-6. Appellee is wrong.

The Commission concedes that the one-House legislative veto provision in the Reorganization Act of 1977 (5 U.S.C. 906) is unconstitutional in light of this Court's decision in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), and does not seek appellate review of that constitutional holding, just as the Secretary conceded in *Edwards* that Section 211(a)(5)(A)

of the Social Security Act, 42 U.S.C. 411(a)(5)(A), is unconstitutional and did not seek appellate review of that holding. Like the Secretary in *Edwards*, the Commission seeks review only of the district court's remedial order — in this case, the district court's dismissal of the Commission's enforcement action. As we explain in the Jurisdictional Statement (at 7-8), the correctness of that dismissal raises questions solely of statutory construction and appropriate judicial relief, not the constitutionality of an Act of Congress, for which the direct appeal mechanism was intended.

In arguing otherwise, appellee seems to be of the view that if an unconstitutional provision of an Act of Congress is found not to be severable, then the entire Act is unconstitutional. See Mot. to Aff. 5. This argument is incorrect. There is no constitutional defect in any provision of the Reorganization Act other than its legislative veto section, since Congress clearly may authorize the President to transfer functions between agencies of the Executive Branch. The question of severability and of the continuing force of the remainder of the Act is purely one of legislative intent: whether Congress would have enacted the remainder of the Act without its unconstitutional provision, so that a court may continue to give effect to the remainder. See *INS* v. *Chadha*, slip op. 10-14; *City of New Orleans* v. *Dukes*, 427 U.S. 297, 302 (1976).[1]

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[1]Appellee relies (Mot. to Aff. 5) on the district court's statement that "the entire Act must be held unconstitutional in that the one-house veto provision was enacted as an integral and inseparable part of the grant of power to the President" (J.S. App. 14a). It is clear, however, that the district court engaged in a routine severability analysis. See *id.* at 9a-14a. The substance of the court's actions, not the label the court attached to the conclusion it reached, must control the question of this Court's jurisdiction under 28 U.S.C. 1252 (cf. *California* v. *Grace Brethren Church*, 457 U.S. 393, 404-407 (1982)), and here the district

Equally without merit is appellee's peculiar suggestion (Mot. to Aff. 5-6) that this case is distinguishable from *Edwards* because there the Secretary conceded the unconstitutionality of the statutory provision in a nationwide class action, while here the Secretary conceded the unconstitutionality of the statutory provision in a case involving only a single employer. The Commission in fact has conceded the unconstitutionality of the legislative veto device in numerous other enforcement actions as well (see note 2, *infra*), and such concessions (and the determination in each case not to appeal the holding of unconstitutionality) have the same nationwide impact as the concession in *Edwards*. Moreover, the Secretary in *Edwards* did challenge the district court's nationwide remedial order, just as the Commission will challenge in this and any similar case a remedial order dismissing its enforcement action. There is, in short, no distinction between this case and *Edwards* insofar as this Court's jurisdiction under 28 U.S.C. 1252 is concerned.

2. Should the Court nevertheless reach the merits of this appeal, we note that the weight of authority is now decidedly against appellee's position. Since the Jurisdictional Statement was filed, there have been six additional district court decisions declining to dismiss enforcement actions brought by the Commission under the Equal Pay Act or the

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court did not purport to find any independent constitutional defect in the remainder of the Act.

Appellee's misunderstanding of the relevant legal principles also explains its assertion (Mot. to Aff. 4) that "the government continues to 'defend the constitutionality' of the Reorganization Act." But it could equally have been said in *Edwards* that the government continued to "defend the constitutionality" of Section 211(a)(5) of the Social Security Act, once the gender-based income attribution provision had been severed.

Age Discrimination in Employment Act.[2] Only one additional decision supports appellee's position, and the district court in that case simply incorporated the decision of the court below without engaging in any independent analysis. *EEOC* v. *Westinghouse Electric Corp.*, Civ. No. 83-1209 (W.D. Pa. Jan. 5, 1984).[3] Moreover, as we shall briefly explain, appellee's arguments in support of the district court's dismissal of the instant suit are seriously flawed.

a. Appellee does not directly answer our submission (J.S. 9-13) that, under the terms of the Reorganization Act, a reorganization plan that was not vetoed by either House of Congress should not be invalidated simply because the unexercised legislative veto authority in 5 U.S.C. 906 has now been held to be unconstitutional. Appellee's only response is that, under *Chadha*, legislative silence in the form of a failure by either House to veto Executive action cannot be regarded as the equivalent of the affirmative bicameral approval and presentment to the President

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[2] *EEOC* v. *Jackson County*, No. 83-1118-CV-W-1 (W.D. Mo. Dec. 13, 1983) (holding that the one-House veto provision is severable and that Congress in any event ratified the transfer of authority to the EEOC); *EEOC* v. *City of Memphis*, No. 83-2672-MA (W.D. Tenn. Dec. 29, 1983) (same); *EEOC* v. *El Paso Natural Gas Co.*, No. EP-83-CA-108 (W.D. Tex. Jan. 16, 1984) (same); *EEOC* v. *Chrysler Corp.*, No. 81-72347 (E.D. Mich. Jan. 23, 1984) (rejecting severability and ratification arguments, but concluding that *Chadha* should not be applied retroactively); *EEOC* v. *Cudahy Foods Co.*, No. C83-855V (W.D. Wash. Dec. 28, 1983) (motion to dismiss denied without explaining reasoning); *EEOC* v. *CBS, Inc.*, No. 81 Civ. 2781 (JES) (S.D.N.Y. Jan. 24, 1984) (same; question certified for interlocutory appeal pursuant to 28 U.S.C. 1292(b)). A seventh decision, *Muller Optical Co.* v. *EEOC*, 574 F. Supp. 946 (W.D. Tenn. 1983), appeal pending, No. 83-5889 (6th Cir.), was discussed in the Jurisdictional Statement (at 7 n.4, 10 n.5 & 13).

[3] On January 30, 1984, the Commission filed protective notices of appeal both to this Court and to the court of appeals (No. 84-3073 3d Cir.) from the district court's decision in *Westinghouse*.

required by the Constitution. See Mot. to Aff. 8-9 & n.7. Appellee misses the point.

The question here is not whether the legislative veto device is constitutional; obviously it is not. Rather, the question is what effect Congress would have intended the holding of unconstitutionality to have on the remainder of the Reorganization Act and on reorganization plans promulgated pursuant to that Act.[4] It is equally obvious that Congress concluded when it passed the Reorganization Act that a reorganization plan that was not vetoed by either of its Houses would carry sufficient indicia of congressional "approval" that the plan should go into effect. See J.S. 10-12. There is no reason to believe that Congress would have intended this "approval" of the plan to be rescinded if a court subsequently held unconstitutional the legislative

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[4]Citing *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312 (1936), appellee contends (Mot. to Aff. 7) that the absence of a severability clause in the Reorganization Act creates a presumption against severability. But this Court has not recognized any such presumption in its recent severability cases. To the contrary, in *Chadha* itself, the Court once again reaffirmed the settled rule that "the invalid portions of a statute are to be severed 'unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " Slip op. 10 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), and *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)). The Court in *Chadha* concluded that Congress had furnished an answer to that question by inserting a severability clause in the statute, which the Court also described as creating a presumption of severability (slip op. 12). But the absence of such a clause does not create a contrary presumption. In either case, the ultimate inquiry is the same: whether it is "evident" that Congress would not have enacted the valid portions independently of the invalid provision. See *United States* v. *Jackson*, 390 U.S. 570, 585 & n.27 (1968); *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425, 441-442 (D.C. Cir. 1982) (en banc), aff'd, No. 81-2008 (July 6, 1983). Appellee plainly has not shown that it is "evident" that Congress intended completed reorganization plans to be invalidated because of the latent legislative veto defect in the Reorganization Act.

veto authority that Congress did not even find it necessary to exercise. To the contrary, the Reorganization Act on its face accords a special finality and stature to a reorganization plan that passed muster under the statutory procedures. See J.S. 12-13.[5]

b. Appellee contends that the 1983 and 1984 appropriations acts discussed in the jurisdictional statement (at 13-14) do not constitute a ratification of the exercise of enforcement authority by the Commission because there is not a sufficient "nexus" between those statutes and the Executive action, such "that a reviewing court can 'reasonably be able to conclude that the grant of authority contemplate[d]' the action in question" (Mot. to Aff. 10, quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 304, 308 (1979)). This contention is wholly without merit. The appropriations acts for fiscal years 1983 and 1984 each provide funds for the "necessary expenses" of the Commission "as authorized by * * * 29 U.S.C. 206(d)" (Pub. L. No. 97-377, 96 Stat. 1874; Pub. L. No. 98-166, 97 Stat. 1088). It is difficult to see how there could be a closer "nexus" between the statutory language providing for the Commission to enforce the Equal Pay Act (29 U.S.C. 206(d)) and the Commission's enforcement action in this case. "The language of the statute is clear, and [the Court has] historically assumed that Congress intended what it enacted." *United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). This explicit congessional

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[5]Cf. 123 Cong. Rec. 9363, 9364, 9365 (1977) (remarks of Rep. Brown) (proposing amendment to limit a constitutional holding to a single reorganization plan; stating that Congress did not intend for completed reorganization plans to be invalidated); *id.* at 9364 (remarks of Rep. Jordan) (opposing Brown amendment, but expressing "trust [in] the justices of the court to decide the issues and do what is reasonable and sensible and logical").

directive is entitled to no less respect simply because it is contained in an appropriations act. See *United States* v. *Will*, 449 U.S. 200, 222 (1980).[6]

c. Contrary to appellee's contention (Mot. to Aff. 11-12), the circumstances of this case clearly weigh against retroactive application of the decision in *Chadha* to invalidate a completed reorganization plan. This conclusion is supported by all of "the three considerations recognized by [the Court's] precedents as properly bearing upon the issue of retroactivity." *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (opinion of Brennan, J.).

First, the decision in *Chadha* involved an issue of first impression, and the holding that the legislative veto device is unconstitutional was not "clearly foreshadowed" by the Court's prior decisions. It does not matter for purposes of this aspect of retroactivity analysis that some Members of Congress expressed doubts about the constitutionality of the legislative veto device during consideration of the Reorganization Act. See Mot. to Aff. 11. Members of Congress also expressed serious reservations about the constitutionality of the jurisdictional provisions of the Bankruptcy Act of 1978, but the Court nevertheless declined to give retroactive effect to its decision in *Northern Pipeline*. See 458 U.S. at 61 n.12, 88 (opinion of Brennan, J.).

Second, retroactive application of *Chadha* in the reorganization context is not necessary to further the operation of the Court's holding that "action taken by one House of Congress * * * violates the strictures of the Constitution" (slip op. 23). The legislative veto authorized by the Reorganization Act of 1977 was not exercised with respect to this

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[6]This case is wholly unlike *TVA* v. *Hill*, 437 U.S. 153 (1978), upon which appellee relies (Mot. to Aff. 9-10); there the lump sum appropriation did not address the legal issue involved. See J.S. 14-15 n.8.

or any other reorganization plan. As a result, here, unlike in *Chadha*, neither House of Congress actually took action to impose its will on persons outside the Legislative Branch in violation of the constitutional requirements of bicameralism and presentment to the President. Nor will either House do so in the future under the Reorganization Act, because the authority conferred by that Act expired in 1981. 5 U.S.C. 905(b). Moreover, the Reorganization Act of 1977 expressly vested the President with authority to implement reorganization plans that were not vetoed by either House of Congress, and the President's "past acts" under that Act therefore are entitled to be "accorded *de facto* validity, just as [the Court has] recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan." *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976). Contrary to appellee's apparent contention (Mot. to Aff. 11), there will be no continuing constitutional problem if the Commission continues to enforce the Equal Pay Act in the future, because the Constitution clearly permits the Commission, as an executive agency, to be vested with that enforcement jurisdiction. Compare *Northern Pipeline, supra; Buckley* v. *Valeo, supra.*

Third, it would be manifestly inequitable to apply *Chadha* retroactively in a way that would invalidate a completed reorganization plan and thereby require this and other suits to be dismissed and the Commission's enforcement activities to be terminated. Congress obviously intended the Equal Pay Act to be enforced by some agency — and specifically by the Commission. Appellee should not be permitted to avoid its obligations and liabilities under that Act by seizing on a latent defect in a different statute, the Reorganization Act, that authorized the transfer of enforcement responsibilities more than four years earlier. Indeed, because the legislative veto authority was never

exercised, appellee can point to no concrete injury resulting from the bare presence of the legislative veto provision in the Reorganization Act that would entitle it to relief.

For the foregoing reasons and the additional reasons set forth in the Jurisdictional Statement, it is respectfully submitted that the Jurisdictional Statement in this case should be held pending a decision in *Heckler* v. *Edwards*, No. 82-874. If the Court concludes in *Edwards* that an appeal does not lie under 28 U.S.C. 1252 where the appellant does not seek review of the district court's holding that a provision in an Act of Congress is unconstitutional, the Court should dismiss the appeal in this case for lack of jurisdiction. In the alternative, if the Court concludes in *Edwards* that a direct appeal must be taken to this Court even where the appellant does not challenge the district court's constitutional holding, the Court should note jurisdiction in this case and reverse the judgment of the district court.

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